

United States Environmental Protection Agency  
Office of Administrative Law Judges  
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**EPA**

**Office of Administrative  
Law Judges**

**Practice Manual:**

A Guide to Frequently Asked Practice Questions

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**This document is solely intended as guidance. The policies and procedures in this guidance do not constitute a rulemaking by the Agency, and may not be relied on to create a substantive or procedural right or benefit enforceable at law by any person.**

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## **Practice Manual:** **A Guide to Frequently Asked Practice Questions**

The United States Environmental Protection Agency (“EPA” or “Agency”) is authorized by various environmental statutes to institute administrative penalty proceedings against alleged violators of those statutes. The particular EPA office that files a complaint instituting an administrative penalty proceeding is referred to as the “complainant,” while the alleged violator is referred to as the “respondent.” Such cases are governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Rules of Practice” or “Rules”), set forth at 40 C.F.R. Part 22, and are generally heard by the Administrative Law Judges (“ALJs”) within the EPA’s Office of Administrative Law Judges (“OALJ”).

This Practice Manual (“Manual”) addresses some of the most frequently asked practice questions in proceedings before the OALJ and is offered as an informal explanatory aid to these proceedings and the Rules of Practice. This Manual is not intended to be cited or relied upon as authority. It is not a complete recitation or explanation of OALJ administrative practices or procedures. Rather, this Manual is intended to highlight those OALJ practices that have generated the most inquiries.

This Manual does not include every exception, detail, and condition regarding each matter addressed. Therefore, it must be read together with the Rules of Practice for a full understanding of the applicable legal procedures. Additionally, please note that the words “you,” “party,” and “opposing party” are used for the sake of simplicity in this Manual, and are intended to apply, as appropriate, to a respondent appearing on its own behalf, a respondent’s counsel or representative, or a complainant’s counsel, singular or plural.

For more information on the OALJ and the statutes administered by the EPA,<sup>1</sup> and for templates of common pleadings, please consult “The Citizen’s Guide,” available on the OALJ website.<sup>2</sup>

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<sup>1</sup> Statutes include the Clean Water Act (“CWA”), Clean Air Act (“CAA”), Toxic Substances Control Act (“TSCA”), Resource Conservation and Recovery Act (“RCRA”), Emergency Planning and Community Right to Know Act (“EPCRA”), Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), and Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”).

<sup>2</sup> <https://www.epa.gov/sites/production/files/2013-09/documents/citizens-guide.pdf>.

## TABLE OF CONTENTS

<b>I. REPRESENTATION</b> .....	<b>6</b>
As a respondent, do I need to hire a lawyer to represent me in a case before the OALJ? .....	6
<b>II. CONTACTING THE OALJ</b> .....	<b>6</b>
How do I contact the OALJ staff?.....	6
How do I make a request of the ALJ assigned to adjudicate my case?.....	7
May I discuss the arguments in my case or settlement of my case with the ALJ or OALJ staff? .....	7
<b>III. COMPLAINT AND ANSWER</b> .....	<b>8</b>
As the complainant, how can I draft the complaint so as to prevent issues from arising during proceedings before an ALJ? .....	8
As the complainant, how do I amend a complaint? .....	9
As the respondent, what information should I include in an answer?.....	10
As the respondent, how do I file and serve an answer? .....	10
As the respondent, how do I amend my answer? .....	11
If the complaint is amended after I've filed an answer, must I answer the amended complaint? .....	11
As the respondent, how do I request that the complaint be dismissed? .....	12
As the complainant, what should I do if the respondent requests in its answer that the complaint be dismissed?.....	12
<b>IV. GENERAL FILING AND SERVICE</b> .....	<b>13</b>
How should I format a document to be filed in a proceeding before the OALJ? .....	13
How do I file and serve a document? .....	14
How do I electronically file a document? .....	15
On whom do I serve a motion before the case is assigned to an ALJ? .....	16
How do I file a document other than electronically? .....	16
What should I do if a due date for a filing falls on a weekend or federal holiday? .....	17
What should I do if I need more time to file a document? .....	17
What should I do if a filing deadline has already passed? .....	18
What should I do if a document I intend to file and serve contains information that is confidential, and I do not want the public to have access to it? .....	18
<b>V. PRELIMINARY STATEMENTS</b> .....	<b>20</b>
What procedures apply to preliminary statements? .....	20
What am I required to provide in the preliminary statement?.....	21
<b>VI. ALTERNATIVE DISPUTE RESOLUTION</b> .....	<b>21</b>

What procedures apply to Alternative Dispute Resolution? .....	21
Is there a cost for ADR? .....	22
<b>VII. SETTLEMENT .....</b>	<b>22</b>
What should I do if I want to settle the case?.....	22
How do I file a CAFO? .....	23
What should we do if we are settling the case but need more time to file the CAFO before a deadline?.....	24
Must I file a prehearing exchange if we are settling the case?.....	24
<b>VIII. CONSOLIDATION AND SEVERANCE .....</b>	<b>25</b>
What does the OALJ advise in regard to consolidation or severance in cases involving the same or related respondent, facility, or event? .....	25
<b>IX. MOTIONS.....</b>	<b>25</b>
How do I file a motion?.....	25
How do I respond to a motion with which I disagree?.....	26
What can I do if I disagree with the ALJ’s order ruling on a motion?.....	27
<b>X. PREHEARING EXCHANGE .....</b>	<b>28</b>
What procedures apply to the prehearing exchange? .....	28
What am I required to provide in the prehearing exchange? .....	29
What information is expected in the narrative summary of expected testimony in the prehearing exchange?.....	30
How do I distinguish between expert and fact witnesses? .....	30
What documents are required for expert witnesses in the prehearing exchange?.....	31
What format should documents be presented in for the prehearing exchange?.....	31
What can I do if, after I have filed my prehearing exchange, I find an additional document or witness that I want the ALJ to consider?.....	32
What should I do if I find that something in my prehearing exchange, or in my response to an order for discovery, is outdated, inaccurate, or incomplete? .....	32
<b>XI. OBTAINING EVIDENCE AND DISCOVERY .....</b>	<b>33</b>
How can I get information from the opposing party or its witnesses that may help my case?.	33
If I receive a request for discovery (including requests for admission, production of documents, answers to interrogatories, etc.), what are my obligations and options? .....	34
<b>XII. DEFAULT .....</b>	<b>36</b>
What can I do if I receive an order to show cause or a motion for default? .....	36
What can I do if I receive a default order? .....	37
<b>XIII. ACCELERATED DECISION AND DISMISSAL.....</b>	<b>37</b>
As the respondent, how do I respond if the complainant files a motion for accelerated decision?.....	37

As the respondent, how do I request that the proceeding be dismissed? .....	38
<b>XIV. STIPULATIONS .....</b>	<b>39</b>
What does the ALJ expect regarding stipulations? .....	39
<b>XV. HEARING.....</b>	<b>40</b>
Where and when will a hearing be held? .....	40
What can I do if I do not want to have a hearing? .....	40
What can I do if I need a witness to testify at the hearing who does not agree to appear voluntarily or who cannot come to the hearing? .....	41
What should I do if a witness who I wish to call at the hearing requires special accommodations in order to testify, such as wheelchair access or an interpreter? .....	42
What should I do if a witness has limited time available during the hearing? May I present testimony out of order? .....	42
What should I do if I have a motion to file just before the hearing?.....	42
What does the ALJ expect regarding exhibits at the hearing? .....	43
If I do not intend to introduce into evidence at the hearing all of the exhibits in my prehearing exchange, should I renumber the hearing exhibits consecutively, or keep the same numbers as in the prehearing exchange? .....	44
Can I present video, slides, enlargements of exhibits (such as maps), PowerPoint presentations, or items on overhead projector at the hearing? .....	44
Can I request that the ALJ personally view the respondent's facility or site? .....	44
What can I do if hearsay is presented at the hearing? .....	45
How do I object to information presented at the hearing? .....	45
What can I do if the ALJ denies my motion for admission into evidence at the hearing?.....	45
What are the general protocols and expectations at the hearing? .....	45
<b>XVI. POST-HEARING ISSUES .....</b>	<b>47</b>
What can I do if I find new evidence after the hearing that I want the ALJ to consider?.....	47
What should I do if the transcript does not reflect the actual testimony at the hearing? .....	48
What does the ALJ expect regarding post-hearing briefs? .....	48
<b>XVII. INITIAL DECISION .....</b>	<b>48</b>
What can I expect in the initial decision? .....	48
When can I expect the initial decision?.....	49
<b>XVIII. APPEALS.....</b>	<b>49</b>
What is the Environmental Appeals Board? .....	49
What is the procedure for appealing an initial decision to the EAB? .....	50

## I. REPRESENTATION

*As a respondent, do I need to hire a lawyer to represent me in a case before the OALJ?*<sup>3</sup>

- No, you may represent yourself or have a non-lawyer representative. A corporate officer may represent a respondent that is a corporation. A partner may represent a respondent that is a partnership. If you are not represented by a lawyer or a qualified representative, you would be referred to as appearing “*pro se*,” and expected to meet the same ethical standards required of attorneys, and complying with the Rules of Practice and ALJ’s orders. You may ask the OALJ staff attorney assigned to the case questions about procedures, such as “how do I . . .,” or “what are my procedural options when . . .,” but the staff attorney cannot provide legal advice or otherwise help with your case.
- Having an attorney represent you, especially if the complainant files any motions or if your case goes to hearing, can be extremely beneficial because there are numerous legal rules that apply in enforcement proceedings. Failure to comply with these rules may substantially affect your case. For example, in upholding a default order issued as a result of a *pro se* respondent’s failure to file a prehearing exchange, the EPA’s Environmental Appeals Board (“EAB”) stated that although the Agency has “adopted the approach that ‘more lenient standards of competence and compliance apply to *pro se* litigants,’” a *pro se* litigant “takes upon himself or herself the responsibility for complying with the procedural rules and may suffer adverse consequences in the event of noncompliance.”<sup>4</sup>
- In lieu of an attorney, the Rules of Practice allows a respondent to retain a non-lawyer representative, although past experiences show that only in the rarest of cases does a party choose this option. Nevertheless, such representatives can be useful if they have had substantial prior experience in administrative litigation proceedings or have significant expertise in the particularities of the disputed issues.

## II. CONTACTING THE OALJ

*How do I contact the OALJ staff?*<sup>5</sup>

- **Do not ever attempt to directly contact an ALJ, whether in person, by email, telephone, or otherwise, unless explicitly directed to do so by an ALJ serving as a neutral during the Alternative Dispute Resolution (“ADR”) process.**
- A list of the telephone numbers for the OALJ’s main line and for OALJ staff is available on the OALJ website.<sup>6</sup>

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<sup>3</sup> See 40 C.F.R. § 22.10 (addressing who may enter an appearance on behalf of a party).

<sup>4</sup> *Rybond, Inc.*, 6 E.A.D. 614, 627 (EAB 1996) (quoting *Hall v. Dworkin*, 829 F. Supp. 1403, 1414 (N.D.N.Y. 1993)).

<sup>5</sup> See 40 C.F.R. § 22.8 (discussing the rules regarding *ex parte* communication).

<sup>6</sup> <https://www.epa.gov/alj/forms/contact-epas-office-administrative-law-judges>.

- To communicate with the litigation ALJ assigned to adjudicate your case, file and serve a written motion requesting that the ALJ take a particular action.
- Letters to the ALJ are not appropriate, except during the ADR process.
- If you have a question about procedures, you may contact the OALJ staff attorney assigned to the case either by telephone or email. When contacting the staff attorney by email the opposing party must be sent a copy.
- If you have a question on a clerical matter, such as whether the OALJ received a document or whether the ALJ has ruled on a motion, you may contact the Headquarters Hearing Clerk by telephone or email.
- Neither the Chief ALJ, nor any other ALJ, will intervene in the adjudication of a case assigned to another ALJ except in the rarest of emergencies. Therefore, any requests regarding a case should be directed solely to the ALJ assigned to it.
- When presiding over a litigation matter, the ALJs do not personally participate in pre-hearing conference calls or speak to parties prior to the hearing. Instead, pre-hearing conference calls and litigation-related questions are addressed by the OALJ staff attorney assigned to the case.

***How do I make a request of the ALJ assigned to adjudicate my case?***

- File and serve a written motion stating the request (see “*How do I file and serve a document?*” in the General Filing and Service section below).

***May I discuss the arguments in my case or settlement of my case with the ALJ or OALJ staff?*<sup>7</sup>**

- Generally, you may discuss the arguments in your case or the settlement of your case with an ALJ only when that ALJ is acting as a neutral in the ADR process.
- While the case is assigned to an ALJ for litigation, you cannot discuss settlement terms or offers with the ALJ or OALJ staff. However, you may report the status of efforts made toward settlement.
- While the case is assigned to an ALJ for litigation, you cannot discuss your arguments in the case with the ALJ or OALJ staff unless all parties are present in a conference or teleconference and the ALJ allows the parties to discuss their arguments in the case.<sup>8</sup>
- You must not indicate the dollar amount or range of a settlement offer or settlement agreement in any correspondence, motion, exhibit, attachment, or communication with

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<sup>7</sup> See 40 C.F.R. §§ 22.8, 22.18 (discussing *ex parte* communication and settlement procedure).

<sup>8</sup> 40 C.F.R. § 22.8.

the ALJ or OALJ staff. Copies of a settlement agreement (“Consent Agreement and Final Order” or “CAFO”) should not be submitted to the ALJ unless it is fully executed and filed with the appropriate Regional Hearing Clerk (if the case was initiated in a regional office of EPA) or the Clerk of the Environmental Appeals Board (if the case was initiated by a Headquarters office of EPA) (for how to file a CAFO, see “*How do I file a CAFO?*” in the Settlement section below).

- If another party in the case includes settlement terms or offers in a document submitted to the ALJ, you should file a motion to strike that information.
- You should advise the ALJ in writing, or contact the OALJ staff attorney assigned to the case by telephone or email, if you have reached a settlement in your case.
- You should contact the OALJ staff attorney assigned to the case immediately if you have reached a settlement within three weeks of the hearing date.

### III. COMPLAINT AND ANSWER

*As the complainant, how can I draft the complaint so as to prevent issues from arising during proceedings before an ALJ?*<sup>9</sup>

- In its identification of the respondent in the complaint, the complainant is making an affirmative representation, ostensibly in good faith and based upon specific knowledge, as to whom it believes is responsible for the violations it alleges occurred in the complaint, and thus, the specific individual or entity it wishes to have a judgment entered against. Therefore, the complaint and the caption should be very carefully drafted to reflect the respondent’s current, full, and correct name. The caption need only include the respondent’s name and need not provide the respondent’s address or any further information regarding the respondent. Moreover, the respondent’s name in the caption should match the allegations in the complaint referring to the respondent, and the identification of the respondent in all other documents filed in the case, including any CAFO. The complainant is strongly encouraged to confirm the correct legal name of any corporate respondent with the applicable state corporation commission prior to filing the complaint to avoid the need for amendment at a later date.
- If either party wishes to change the name of the respondent as identified in the complaint for any reason, a motion to amend the complaint (bearing the original caption) must be filed and granted before any change is made. For example, if the parties wish to change the named respondent in connection with a settlement, they must file a motion to amend the complaint and have it granted before they file a CAFO utilizing a new identification for the respondent named therein. Parties may not unilaterally change the identification of the parties to the case.
- The docket number indicated on the complaint shall only be that four segment number

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<sup>9</sup> See 40 C.F.R. § 22.14 (addressing content, amendment, and withdrawal of the complaint).



that is provided to the parties by the Hearing Clerk in the following format: statute abbreviation(s) (e.g., TSCA, RCRA, CWA, CAA, FIFRA, MPRSA, MM), followed by Region number (using two digits, e.g., “03”) or Headquarters abbreviation (“HQ”), then the fiscal year (in four digits), ending with the individual case number (e.g., RCRA-04-2005-0001).

- Each numbered paragraph of the complaint should state either an allegation of fact or a conclusion of law, not both. Individualized simple, separate statements of fact or law in serially numbered paragraphs will facilitate all parties determining exactly what is in dispute in the proceeding. There is no limit on the number of paragraphs that may be contained in a complaint.
- Alleged violations of different regulatory or statutory provisions, or the same provisions over several years constituting separate units of violation, should be separated into individual consecutively numbered “counts” so that the complaint continues to state an actionable claim even if selected counts are struck (e.g., on a valid statute of limitations defense).

*As the complainant, how do I amend a complaint?*<sup>10</sup>

- If, after filing the complaint, you believe that it is deficient in some way, the complaint can be amended or part of the complaint can be withdrawn, as appropriate.<sup>11</sup>
- The complaint can be amended as a matter of right before the answer is filed.<sup>12</sup>
- Following the filing of an answer, the complaint can be amended only upon motion granted by the ALJ. These motions should be filed immediately to provide ample notice of the proposed changes.
  - A signed copy of the [proposed] amended complaint should be attached to the motion to amend. Such an attachment allows the amended complaint to be deemed “filed” if and when an order is issued granting the proposed amendment.
  - A copy of the proposed amended complaint with the proposed amendments highlighted should also be attached to the motion to amend in order to aid the ALJ in identifying the proposed amendments.
  - In determining whether to grant a motion to amend the complaint, the ALJ considers whether there would be prejudice to the opposing party or undue delay of proceedings, and whether the motion is made in bad faith or with dilatory motive.
- If an amendment is taken as a matter of right or is granted upon motion, the complainant

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<sup>10</sup> See 40 C.F.R. § 22.14(c)–(d) (addressing amendment and withdrawal of the complaint).

<sup>11</sup> 40 C.F.R. § 22.14(c)–(d).

<sup>12</sup> 40 C.F.R. § 22.14(c).

must serve the amended complaint upon the respondent in accordance with the procedural rule governing service of a complaint.<sup>13</sup> However, if a signed copy of the [proposed] amended complaint is attached to the motion to amend, and the amendment is not substantive (e.g., it merely decreases the proposed penalty), or is concurred with by the respondent(s), the complainant may include in its motion to amend a request that the amended complaint be deemed filed and served on the respondent as of the date of the order granting the motion. The respondent must agree to such a request, and this agreement must be stated in the motion. This practice saves time, particularly if the parties are settling.

***As the respondent, what information should I include in an answer?<sup>14</sup>***

- In your answer to the complaint, you must admit, deny, or explain each numbered paragraph in the complaint that alleges a fact or facts.<sup>15</sup>
  - Your answer should list each paragraph number of the complaint, and for each paragraph that alleges a fact or facts, state for each such paragraph that it is either “admitted,” “denied,” or “denied for lack of knowledge.” If none of those apply, provide an explanation for the paragraph at issue.
  - If you deny only a portion of the paragraph, specify what portion you are denying and what portion you are admitting or to which you have no knowledge.
- The answer must also list any defenses.<sup>16</sup> Defenses are any factual or legal arguments that you believe indicate that you did not commit the violations alleged in the complaint, or would otherwise prevent the complainant from assessing the requested penalty, either in full or in part.<sup>17</sup>
- If you wish to present evidence in the form of witness testimony and/or documents to an ALJ, and/or cross examine any witness testifying for the complainant, then clearly state in your answer that you are requesting a hearing.<sup>18</sup>

***As the respondent, how do I file and serve an answer?<sup>19</sup>***

- To file an answer, send the original document, plus one copy, to the appropriate Regional Hearing Clerk (if the case was initiated in a regional office of EPA) or the Headquarters Hearing Clerk (if the case was initiated by a Headquarters office of EPA) in the manner

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<sup>13</sup> See 40 C.F.R. § 22.5(b)(1) (discussing service of the complaint).

<sup>14</sup> See 40 C.F.R. § 22.15 (discussing the answer to the complaint).

<sup>15</sup> 40 C.F.R. § 22.15(b).

<sup>16</sup> 40 C.F.R. § 22.15(b).

<sup>17</sup> 40 C.F.R. § 22.15(b).

<sup>18</sup> 40 C.F.R. § 22.15(b).

<sup>19</sup> See 40 C.F.R. § 22.15(a) (addressing filing and service of the answer).

identified in the complaint.<sup>20</sup>

- The answer must be filed within 30 days after service of the complaint. Service of the complaint is considered complete when the return receipt is signed. The answer is “filed” when it is received by the Regional Hearing Clerk.<sup>21</sup>
- A copy of the answer must be served on all other parties personally, by U.S. mail (including certified mail, return receipt requested, Overnight Express, and Priority Mail), by any reliable commercial delivery service, or by facsimile or other electronic means if service by such electronic means is consented to in writing.<sup>22</sup>
- The answer must include a certificate of service, which states when the document was sent, the addresses to which it was sent, and the method by which it was sent (e.g., by overnight mail, hand delivery, or certified or first class mail), and contains the signature and name of the person who sent the document.<sup>23</sup> An example of a certificate of service is appended to “The Citizen’s Guide,” available on the OALJ website.<sup>24</sup>

*As the respondent, how do I amend my answer?*<sup>25</sup>

- If you wish to change or add something to your answer, you must file and serve a motion to amend the answer, which explains why you want to amend it, and what you propose to add or change.<sup>26</sup>
- In determining whether to grant a motion to amend an answer, the ALJ considers whether there would be prejudice to the opposing party or undue delay of proceedings, and whether the motion is made in bad faith or with dilatory motive.<sup>27</sup>

*If the complaint is amended after I’ve filed an answer, must I answer the amended complaint?*<sup>28</sup>

- You must file and serve an answer to the amended complaint within 20 days of the date the return receipt or commercial delivery receipt was signed for, indicating service of the amended complaint, except:
  - If the ALJ’s order granted a request for the amended complaint to be deemed filed

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<sup>20</sup> 40 C.F.R. § 22.15(a).

<sup>21</sup> 40 C.F.R. § 22.5(a)(1).

<sup>22</sup> 40 C.F.R. §§ 22.5(b)(2), 22.15(a).

<sup>23</sup> 40 C.F.R. § 22.5(a)(3).

<sup>24</sup> <https://www.epa.gov/sites/production/files/2013-09/documents/citizens-guide.pdf>.

<sup>25</sup> See 40 C.F.R. § 22.15(e) (addressing amendment of the answer).

<sup>26</sup> 40 C.F.R. § 22.15(e).

<sup>27</sup> See *Lazarus, Inc.*, 7 E.A.D. 318, 331 (EAB 1993) (discussing considerations for permitting amendment to the answer).

<sup>28</sup> See 40 C.F.R. § 22.14(c) (addressing response to an amended complaint).

and served on the date of the order, then you have 20 days from the date of that order to file and serve an answer.

- If there were only minor technical amendments to the complaint, the penalty was decreased, or you agree with the amendments, you need not file an answer to the amended complaint. However, if in the order granting the request to amend the complaint the ALJ does not excuse you from submitting an answer, you should file and serve a statement that incorporates by reference your original answer to the complaint.
- If only a portion of the complaint was amended, you may file an answer indicating your admission, denial, or explanation only to the amended portion, along with any defenses to the amended portion, rather than answer the entire amended complaint. You should include a statement that the answer to the amendment of the complaint incorporates by reference all of, or stated portions of, your initial answer to the complaint.

***As the respondent, how do I request that the complaint be dismissed?<sup>29</sup>***

- If you wish to request that the complaint be dismissed, you must file a separate document entitled “Motion to Dismiss.”<sup>30</sup>
- General requests for dismissal made in an answer usually do not meet the requirements of a motion to dismiss and are thus not generally responded to by either the complainant or the ALJ.<sup>31</sup>
- For more information on dismissing the complaint, see “*How do I request that the proceeding be dismissed?*” in the Accelerated Decision section below.

***As the complainant, what should I do if the respondent requests in its answer that the complaint be dismissed?<sup>32</sup>***

- If the request includes the required elements of a motion, stating the particular reasons for dismissal, and particularly if any documents are attached in support of the request, then you should file a response.<sup>33</sup>
- If grounds for dismissal are not stated with particularity, it does not constitute a motion and therefore does not require any response.<sup>34</sup>

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<sup>29</sup> See 40 C.F.R. § 22.20(a) (addressing dismissal on motion of the respondent).

<sup>30</sup> 40 C.F.R. § 22.20(a).

<sup>31</sup> See 40 C.F.R. § 22.16(a) (setting forth the requirements of motions).

<sup>32</sup> See 40 C.F.R. § 22.16(a)–(b) (discussing the requirements for motions and responses to motions).

<sup>33</sup> 40 C.F.R. § 22.16(a)–(b).

<sup>34</sup> See 40 C.F.R. § 22.16(a) (setting forth the particularity required of motions).

#### IV. GENERAL FILING AND SERVICE

**NOTE: This section addresses filing of documents other than the answer and CAFO.** For information about filing an answer, see “*How do I file and serve an answer?*” in the Complaint and Answer section above. For information regarding filing a CAFO, see “*How do I file a CAFO?*” in the Settlement section below.

*How should I format a document to be filed in a proceeding before the OALJ?*<sup>35</sup>

- Below are general requirements for formatting documents:
  - The top portion of the first page of the complaint, including “United States Environmental Protection Agency,” the name of the respondent(s), and the docket number of the case, is called the “caption.”<sup>36</sup> Unless, and until, it is changed by an ALJ order, all documents filed in the case must bear the same caption, including the respondent’s name and docket number, formatted identical to the caption on the first page of the complaint. However, the respondent’s address, if contained in the caption on the complaint, need not appear in the caption placed on subsequently filed documents. A sample caption is appended to the “The Citizen’s Guide,” available on the OALJ website.<sup>37</sup>
  - Documents filed in paper format should be printed only on a single side.
  - Textual documents filed electronically must be in Portable Document Format (“PDF”).
  - An adequate margin of at least one inch should be provided for at the top of each page.
  - Each page of each document should have a page number at the bottom of the page.
  - Documents should be double spaced, with at least 12 point, Times New Roman font, including the footnotes.
  - Briefs and legal memoranda longer than 20 pages (excluding attachments) must include a table of contents and table of authorities with page references.<sup>38</sup>
  - The first document filed by a party must contain the name, mailing address, telephone number, and email address of the party or the party’s representative.<sup>39</sup>

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<sup>35</sup> 40 C.F.R. § 22.5(c)(1)–(4) (addressing the format of filed documents).

<sup>36</sup> 40 C.F.R. § 22.5(c)(2).

<sup>37</sup> <https://www.epa.gov/sites/production/files/2013-09/documents/citizens-guide.pdf>.

<sup>38</sup> 40 C.F.R. § 22.5(c)(2).

<sup>39</sup> 40 C.F.R. § 22.5(c)(4).

- Each document filed in a proceeding (other than exhibits) must be signed by the party or representative submitting it.<sup>40</sup>
- Each document filed in a proceeding must include a certificate of service.<sup>41</sup> This should be the last page of any filing, placed after any attachments or exhibits (see “*How do I file and serve a document?*” below).
- Templates for some documents routinely filed with the OALJ are included in the appendix of “The Citizen’s Guide,” available on the OALJ website.<sup>42</sup> These templates are provided solely to serve as guides. The ALJs will accept documents that do not conform to these templates, provided that all applicable regulatory requirements have been satisfied.

***How do I file and serve a document?***<sup>43</sup>

- Every document that a party wishes the ALJ to consider must be both “filed” (sent to the appropriate Hearing Clerk) and “served” (sent to the ALJ and to each opposing party or its representative).
- Electronic filing is strongly encouraged. To electronically file a document, follow the procedures described under “*How do I electronically file a document?*” below.
- To otherwise file a document (other than an answer or CAFO), send (via mail, courier, commercial delivery service, or hand delivery), the original document plus one copy to the Headquarters Hearing Clerk in sufficient time before it is due, so that the Headquarters Hearing Clerk will receive it on or before the due date.
- A document is “filed” when it is received by the appropriate Hearing Clerk.<sup>44</sup>
- To serve the document, send (by mail, courier, commercial delivery service, or hand delivery, or by facsimile or email if such electronic service is consented to in writing) a copy of the document to the ALJ and to all the other parties on the same date as a document is filed.<sup>45</sup> Documents filed electronically through the OALJ E-Filing System are deemed to have also been served electronically on the ALJ.
- Each document filed and served must include a certificate of service that states when the document was sent, the addresses to which it was sent, and the method by which it was sent (by overnight mail, hand delivery, certified or first class mail), and contains the

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<sup>40</sup> 40 C.F.R. § 22.5(c)(3).

<sup>41</sup> 40 C.F.R. § 22.5(a)(3).

<sup>42</sup> <https://www.epa.gov/sites/production/files/2013-09/documents/citizens-guide.pdf>.

<sup>43</sup> See 40 C.F.R. § 22.5 (detailing procedures for filing and serving documents).

<sup>44</sup> 40 C.F.R. § 22.5(a)(1).

<sup>45</sup> 40 C.F.R. § 22.5(b).

signature and name of the person who sent the document.<sup>46</sup> An example of a certificate of service is appended to “The Citizen’s Guide,” available on the OALJ website.<sup>47</sup>

### *How do I electronically file a document?<sup>48</sup>*

- Documents can be filed electronically through the OALJ E-Filing System, a web-based tool accessible at <https://www.epa.gov/alj>. Any party choosing to file electronically must first register with the OALJ E-Filing System at [EAB-ALJ E-Filing System Login/Registration](#).
- The OALJ E-Filing System will stamp the submitted document with the official time immediately upon submission. To be considered timely, documents submitted through the OALJ E-Filing System must be received by 11:59 p.m. Eastern Time on the day the document is required to be filed.<sup>49</sup>
- The OALJ E-Filing system will generate an electronic receipt of the submission that will be sent by email to both the party submitting the document and the Headquarters Hearing Clerk. There may be a delay of approximately one half-hour between document submission and transmission of the electronic receipt.
- A motion and associated brief may be filed together through the OALJ E-Filing System. However, any documents filed in support of a brief, motion, or other filing, such as copies of proposed exhibits submitted as part of a prehearing exchange, should be submitted separately as an attachment. Where there are multiple attachments, they should be filed together in a single electronic file, to the extent technically practicable.<sup>50</sup>
- Documents filed electronically through the OALJ E-Filing System are deemed to constitute both the original and one copy of the document.
- The OALJ E-Filing System will accept any type of digital file, but the file size is limited to 70 megabytes. Electronically filed textual documents must be in PDF.
- Sending a document to the email address of a staff member within the OALJ, or sending a document to [aljfiling@epa.gov](mailto:aljfiling@epa.gov), rather than submitting it through the official OALJ E-

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<sup>46</sup> 40 C.F.R. § 22.5(a)(3).

<sup>47</sup> <https://www.epa.gov/sites/production/files/2013-09/documents/citizens-guide.pdf>.

<sup>48</sup> See <https://www.epa.gov/alj>; see also Standing Order Authorizing Electronic Filing in Proceedings before the Office of Administrative Law Judges, August 11, 2014, <https://www.epa.gov/sites/default/files/2014-10/documents/alj-standing-order-efiling.pdf>. (Electronic filing has been authorized by the Standing Order. This Order does not mandate electronic filing but allows it as an alternative to paper filing.)

<sup>49</sup> Standing Order Authorizing Electronic Filing in Proceedings before the Office of Administrative Law Judges, Aug. 11, 2014.

<sup>50</sup> Standing Order Authorizing Electronic Filing in Proceedings before the Office of Administrative Law Judges, Aug. 11, 2014.

Filing System, does not constitute electronic filing unless otherwise specified in writing by the ALJ.<sup>51</sup>

***On whom do I serve a motion before the case is assigned to an ALJ?***

- If the motion is filed before an answer is filed (e.g., a motion to extend time to answer), serve it on the opposing party and the Regional Judicial Officer. However, if the case was initiated at EPA Headquarters, the motion should be served on the Chief Administrative Law Judge.
- If the motion is filed after an answer is filed, serve it on the opposing party and the Chief Administrative Law Judge.
- Always file motions and all other documents with the appropriate Hearing Clerk.

***How do I file a document other than electronically?***<sup>52</sup>

- **NOTE: This section addresses filing of documents other than the answer and CAFO.** For information about filing an answer, see “*How do I file and serve an answer?*” in the Complaint and Answer section above. For information regarding filing a CAFO, see “*How do I file a CAFO?*” in the Settlement section below.
- Send the original document and one copy by mail, commercial delivery, overnight mail, or hand delivery, in enough time to reach the Headquarters Hearing Clerk at or before 4:30 p.m. on the date that it is due.
- U.S. Postal Service Mailing Address:  
U.S. Environmental Protection Agency  
Office of Administrative Law Judges  
Mail Code 1900R  
1200 Pennsylvania Ave. N.W.  
Washington, DC 20004
- FedEx/UPS/Commercial/Hand-Delivery:  
U.S. Environmental Protection Agency

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<sup>51</sup> Standing Order Authorizing Electronic Filing in Proceedings before the Office of Administrative Law Judges, Aug. 11, 2014.

<sup>52</sup> Filing of documents is addressed in the Rules of Practice at 40 C.F.R. § 22.5(a). However, the procedure described in this rule has been modified by the Headquarters Hearing Clerk pilot program, described within Memorandum Re: Pilot Program to Migrate Certain Regional Hearing Clerk Functioning to the Headquarters Hearing Clerk, issued by Chief Administrative Law Judge Susan L. Biro on April 27, 2012, and subsequently, Memorandum Re: Amendment of Hearing Clerk Pilot Program as to CAFOS, issued by Chief Administrative Law Judge Susan L. Biro on March 14, 2014. These Memoranda are available on the OALJ website at <https://www.epa.gov/alj>.



Office of Administrative Law Judges  
Ronald Reagan Building, Room M1200  
1300 Pennsylvania Ave. N.W.  
Washington, DC 20004

- The date it is stamped by the Headquarters Hearing Clerk is the official filing date, upon which the ALJ will rely in determining timeliness.
- Make sure to include a certificate of service with the filing.
- If you submit a document by mail or commercial delivery service on or very close to the due date, email a courtesy copy of the document to the OALJ at [oaljfilings@epa.gov](mailto:oaljfilings@epa.gov).
- Use a calendar system and mark on your calendar all due dates in the administrative proceedings so you do not miss any deadlines. Your failure to adequately plan your time is not good cause for missing a filing deadline.

***What should I do if a due date for a filing falls on a weekend or federal holiday?***<sup>53</sup>

- The document is then due the next business day.

***What should I do if I need more time to file a document?***<sup>54</sup>

- You must file and serve a motion for an extension of time as a separate written document. The request for an extension should not be included in a letter, a status report, or in the text of another motion unless the title of the document states that it includes a request for extension of time (e.g., “Status Report and Motion for Extension of Time” or “Motion to Amend Complaint and Motion for Extension of Time to Respond to Motion to Dismiss”).
- The motion for an extension should state whether the opposing party agrees or does not agree to the request for extension, so a ruling may be issued quickly. If the motion is unopposed, this should be indicated in the title (i.e., “Unopposed Motion for Extension”).
- The motion should specify the number of days of extension requested and must give specific reasons for the need for that amount of time. Indefinite extensions are rarely granted.<sup>55</sup>
- If the motion states that the opposing party agrees with the motion, or it is a joint motion (a request made and signed by both parties), it should be filed and served such that it is received by the Headquarters Hearing Clerk at least one full day prior to the relevant

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<sup>53</sup> 40 C.F.R. § 22.7(a).

<sup>54</sup> See 40 C.F.R. § 22.7(b) (addressing extensions of time).

<sup>55</sup> See *Johnson*, 2004 WL 1281182, at \*3 n.2 (ALJ, May 11, 2004) (Order Granting Leave to Amend Complaint and Extension of Time) (discussing why indefinite extensions are rarely appropriate in this context).

deadline. Do not assume that the motion will be granted merely because the opposing party does not oppose it.

- If the motion for extension of time is not an agreed or joint motion, it should be filed and served as soon as possible before the due date you wish to extend, giving enough time for the opposing party to file a response and the ALJ to issue a written order before the deadline expires.<sup>56</sup>
- If the motion is filed by a method other than hand delivery or the OALJ E-Filing System less than two weeks before the due date, a courtesy copy of the motion should be emailed in PDF form to the Headquarters Hearing Clerk and the staff attorney assigned to the case.
- If you have not received a ruling by the deadline, you may contact the Headquarters Hearing Clerk or the staff attorney assigned to the case to ask whether the motion has been ruled on yet. Be aware that ALJs often travel for hearings and may not be able to address pending motions until they return. Such circumstances may delay the issuance of rulings for days or weeks at a time. Therefore, the parties are strongly encouraged to file any motions seeking extensions of time as soon as they become aware that additional time may be required.

***What should I do if a filing deadline has already passed?***

- If you wish for the ALJ to accept a document after the applicable due date, you must file and serve a separate document entitled “Motion for Leave to File Out of Time,” along with the document you are intending to file late.
- The motion for leave to file out of time should state whether the other party agrees with the motion or not. It should also specifically state why you missed the deadline.
- A motion for leave to file out of time may not be granted by the ALJ, but the sooner you file it, the more likely it is to be granted.

***What should I do if a document I intend to file and serve contains information that is confidential, and I do not want the public to have access to it?***<sup>57</sup>

- All information filed in a proceeding before the OALJ becomes part of the official case record, which is available to the public. However, you may take steps to protect confidential information from public disclosure.

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<sup>56</sup> See 40 C.F.R. § 22.7(b) (addressing the timing of a motion for extension of time).

<sup>57</sup> See 40 C.F.R. Part 2 Subpart B, 40 C.F.R. §§ 22.5(d), 22.22(a)(2) (discussing filing of confidential information); see also <https://www.epa.gov/alj/administrative-law-judges-privacy-act-statement-and-notice-disclosure-confidential-and-personal>.

- Generally, a party chooses what information to file. Thus, you can elect not to file a document that contains information you wish to keep private or redact (i.e., delete, remove, or obscure) such information from the document if you choose to file it. However, if you wish for the ALJ to view and consider the information in making a ruling or rendering a decision (e.g., you wish for the ALJ to consider personal financial information that could demonstrate to the ALJ your inability to pay a penalty), but otherwise wish to protect it from public disclosure, you are required to file the information and claim that it is entitled to confidential treatment in the proceeding.
- Claims that information is entitled to confidential treatment must be raised at the time the document containing the given information is filed. The filing party is responsible for adhering to the applicable procedures in claiming that the information is entitled to confidential treatment. If the filing party does not adhere to those procedures, it is deemed to have waived any claims of confidentiality with regard to that information, and the information may be made available to the public without further notice.
- Information that may be considered as entitled to confidential treatment includes:
  - (1) information that a business has deemed confidential and has taken steps to protect, that is not required by statute to be disclosed, and that would likely result in substantial harm to the business’s competitive position if made public (“confidential business information” or “CBI”); and
  - (2) information that can be used to distinguish, trace, or identify an individual’s identity, including personal information that is linked or linkable to an individual, the disclosure of which would constitute an unwarranted invasion of personal privacy (“sensitive personally identifiable information” or “PII”), such as Social Security numbers, medical records, and personal financial information.
- To claim that a document contains information that is entitled to confidential treatment, you must file the document “under seal.” A document is filed “under seal” when a copy of it is filed and served in a separate sealed envelope, clearly and prominently marked as confidential, attached to the outside of which is:
  - (1) a cover letter stating that you are requesting that the enclosed information be treated as confidential and, if the given information pertains to the interests of a business, requesting that the EPA refer it to the appropriate EPA legal office for determination under 40 C.F.R. Part 2 Subpart B; and
  - (2) a copy of the document with the confidential information redacted. You may redact the confidential information either by making a copy of the document with the confidential information stricken out or by deleting the confidential information and inserting the words “confidential information deleted” in brackets in the areas where the confidential information occurs in the sealed document.<sup>58</sup>

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<sup>58</sup> 40 C.F.R. § 22.5(d).

- The OALJ E-Filing System is not equipped to accommodate or protect the privacy of information claimed to be entitled to confidential treatment. If you wish to electronically file a document containing such information, you must redact the confidential information from the document before filing the redacted version of the document through the OALJ E-Filing System. In order for the ALJ to view the confidential information, you must then file a paper copy of the unredacted version of the document “under seal,” as described above. Unredacted versions of the document must not be filed through the OALJ E-Filing System. Doing so is deemed a waiver of any claims of confidentiality and consent to public disclosure.
- Filing your document under seal does not mean that it is necessarily entitled to be treated as confidential. Rather, it means that unless and until a determination is made that it is not entitled to confidential treatment, the sealed document will be kept in a locked cabinet and protected from public disclosure, and will be reviewed by the ALJ “in camera,” which means in the ALJ’s chambers, accessed only by the ALJ and OALJ staff, as necessary.
- The redacted document will be available to the public, as are all filed documents except those filed under seal.<sup>59</sup>
- If confidential evidence will be presented at the hearing, you may file a motion for a protective order, requesting that those parts of the hearing be closed to the public and that those parts of the record be protected from unauthorized disclosure.<sup>60</sup>

## V. PRELIMINARY STATEMENTS

### *What procedures apply to preliminary statements?*

- After an ALJ is assigned to adjudicate a case, the ALJ typically issues a prehearing order setting various deadlines, including a deadline for the parties to file preliminary statements.
- Preliminary statements must be filed and served on or before the date stated in the prehearing order, unless:
  - (1) a CAFO has been fully executed and filed with the appropriate Regional Hearing Clerk (if the case was initiated in a regional office of EPA) or the Clerk of the Environmental Appeals Board (if the case was initiated by a Headquarters office of EPA) on or before that due date; or

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<sup>59</sup> 40 C.F.R. § 22.5(d)(4).

<sup>60</sup> 40 C.F.R. § 22.22(a)(2).

- (2) a motion for an extension of time to file the preliminary statement has been granted by the presiding ALJ (see “*What if I need more time to file a document?*” in the General Filing and Service section above).
- The mere fact that parties have agreed to a settlement or have drafted a CAFO does not obviate the requirement to file preliminary statements (see “*What if we are settling but need more time to file the CAFO before a deadline?*” in the Settlement section above, for more information).
- Preliminary statements not only must be served on all parties, but also must be filed with the Headquarters Hearing Clerk and served on the presiding ALJ.

***What am I required to provide in the preliminary statement?***

- In the prehearing order, the ALJ identifies the information that the parties are required to provide in their preliminary statements. Generally, you will be directed to provide:
  - (1) your preference for the location of the hearing (see “*Where and when will a hearing be held?*” in the Hearing section below);
  - (2) your consent to service of orders and decisions by this Tribunal, and to service of documents filed by other parties, by email only during the proceeding (see “*How do I electronically file a document?*”); and
  - (3) a valid email address at which you will accept electronic service.

**VI. ALTERNATIVE DISPUTE RESOLUTION**

***What procedures apply to Alternative Dispute Resolution?*<sup>61</sup>**

- The parties may engage in any Alternative Dispute Resolution (“ADR”) process within the scope of the Alternative Dispute Resolution Act, 5 U.S.C. §§ 571–584. The parties may choose the person to act as a neutral themselves or file a joint motion with the ALJ requesting the appointment of a neutral. Typically, the ALJs will entertain such joint motions only if filed during a seven-day period following the completion of the prehearing exchange process.
- If the ALJ grants the parties’ joint motion for the appointment of a neutral, the ALJ will refer the case to the Chief ALJ, who will then appoint a staff member of the OALJ who has had mediation training to serve as a neutral and assist the parties in reaching an agreement in settlement of the case. The granting of a joint motion for the appointment of a neutral does not automatically stay litigation deadlines set by the ALJ.
- The neutral typically begins ADR by arranging a telephone conference with all of the

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<sup>61</sup> See 40 C.F.R. § 22.18(d) (discussing ADR and applicable rules).

parties to discuss the general procedures and expectations. The neutral then conducts ADR sessions with the parties jointly and separately as needed.

- As a general practice, the neutral provides mediation by hearing each party's position and arguments, either in writing, orally, or both; helping identify the factual and legal issues; enabling each party to understand the other party's position and arguments; maintaining the parties' focus on the factual and legal issues that may lead toward settlement; and helping the parties explore their options to assist in reaching a settlement. The neutral may ask questions of the parties and may request that the parties submit documents or other information. At a party's request, the neutral may offer an opinion as to the strengths and/or weaknesses of a case and/or defenses; however, the decision to do so, and whether to deliver the opinion in writing or orally, is entirely within the discretion of the neutral. If the neutral does offer an opinion, the party may elect to discuss it with the neutral separately or together with the other party.
- ADR sessions are usually conducted by telephone. In rare instances, ADR sessions will be conducted in person or by video, upon the request of the parties.
- Confidentiality is strictly observed during and after the ADR process. The neutral will not disclose to anyone the contents of any of the parties' communications during ADR. Documents and information exchanged between the parties and/or neutral during the ADR process are generally not filed or served, and thus do not become part of the record; they are for confidential settlement purposes only. Any written records and notes of the neutral concerning the ADR process are destroyed upon its conclusion.
- If a motion is filed during ADR, and all parties agree with the motion, the neutral may refer it to the Chief ALJ for issuance of an order, but such referral does not automatically delay or stay the ADR process. The ALJ designated to preside after termination of ADR will rule on all contested motions.
- Unless terminated earlier at the request of one of the parties, the ADR process automatically terminates after 60 days, but the parties may request an extension of up to 60 days. At that time, if settlement has not yet been achieved, the case will be assigned to an ALJ to proceed with the litigation process.

### ***Is there a cost for ADR?***

- There is no charge to any party in connection with participating in ADR.

## **VII. SETTLEMENT**

### ***What should I do if I want to settle the case?***<sup>62</sup>

- At all points in the administrative process, you have the option to settle the case rather

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<sup>62</sup> See 40 C.F.R. § 22.18 (discussing dispute resolution and settlement).

than seek resolution through litigation.

- The written agreement containing all of the terms and conditions of the parties' settlement is called a "Consent Agreement and Final Order" or "CAFO." To be complete, a CAFO must be signed by all the parties, and then also reviewed, approved, and signed by the Regional Judicial Officer or Regional Administrator (or delegate) and filed with the Regional Hearing Clerk (if the case was initiated in a regional office of EPA) or reviewed, approved, and signed by the Environmental Appeals Board and filed with the Clerk of the Environmental Appeals Board (if the case was initiated by a Headquarters office of EPA).<sup>63</sup>
- If you wish to settle a case in lieu of going to hearing, you should start final settlement attempts weeks in advance of the hearing date. It can take several days, or even weeks, for a CAFO that is acceptable to all parties to be signed by the appropriate EPA officials and filed with the appropriate Clerk. If a Supplemental Environmental Project ("SEP") is part of the settlement, it may take even longer to get all the necessary Agency approvals.
- If a CAFO is not filed with the appropriate Clerk sufficiently in advance of the date on which the hearing is scheduled to begin (typically two business days), you are still expected to appear at the hearing and state on the record that the case has settled.

#### *How do I file a CAFO?*<sup>64</sup>

- In order to comply with the Rules of Practice, a CAFO must state that the respondent:
  - admits to the jurisdictional allegations of the complaint;
  - consents to the assessment of any stated civil penalty, to the issuance of any specified compliance or corrective action order, to any conditions specified in the CAFO, and to any stated permit action; and
  - waives any right to contest the allegations and appeal the proposed final order.
- The CAFO must be signed by all of the parties, and then also reviewed, approved, and signed by the Regional Judicial Officer or Regional Administrator (or delegate) (if the case was initiated in a regional office of EPA) or reviewed, approved, and signed by the Environmental Appeals Board (if the case was initiated by a Headquarters office of EPA).<sup>65</sup>
- Once the CAFO has been fully executed by the parties and ratified by the appropriate

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<sup>63</sup> 40 C.F.R. § 22.18(b)(2).

<sup>64</sup> See 40 C.F.R. § 22.18(b)(2); Memorandum Re: Amendment of Hearing Clerk Pilot Program as to CAFOS, Mar. 14, 2014 (available on the OALJ website at <https://www.epa.gov/alj>) (describing the requirements and procedure for filing a CAFO).

<sup>65</sup> 40 C.F.R. § 22.18(b).

EPA officials, it must be filed with the appropriate Regional Hearing Clerk (if the case was initiated in a regional office of EPA) or the Clerk of the Environmental Appeals Board (if the case was initiated by a Headquarters office of EPA).<sup>66</sup>

***What should we do if we are settling the case but need more time to file the CAFO before a deadline?***

- One party should file and serve a written motion seeking an extension of the deadline and stating that the opposing party agrees with the extension, or the parties should file and serve a written joint motion for extension. If you are unable to contact the opposing party in time, state that in the motion for extension.
- Do not ignore the ALJ's deadlines. The pendency of settlement negotiations does not constitute a basis for failing to comply with deadlines set by the ALJ. The case may be dismissed, or the respondent held in default, if a deadline is missed.

***Must I file a prehearing exchange if we are settling the case?***

- The ALJs understand that parties may not wish to expend time and resources on preparing and submitting prehearing exchanges if they are clearly making progress towards settling the case. However, prehearing exchange deadlines help each party to make good faith efforts toward settlement within a reasonable amount of time, deter parties from attempting to delay proceedings, and ensure that the ALJs comply with Section 555(b) of the Administrative Procedure Act, 5 U.S.C. § 555(b), which requires each federal agency to conclude a matter presented to it “within a reasonable time.” Pursuant to that provision, the OALJ has a policy of completing its cases within 18 months of the date of receipt.
- If significant progress is being made toward settlement, you may file a motion for extension of time to file prehearing exchanges. Before filing this motion, ask the opposing party whether it agrees with your request and state in the motion whether there is agreement. The motion should also state the progress made toward settlement (e.g., a draft CAFO has been sent to the opposing party, a proposed SEP is undergoing review by EPA), the time frame(s) or date(s) that actions are expected to be completed, and any unusual circumstances that require more time. Request a specific due date based on the stated time frame(s)/date(s).
- If you are finalizing a CAFO and the prehearing exchange deadline is approaching, file a motion for extension unless you are sure that the CAFO will be fully executed and filed by the due date.
- For more information, see “*What if I need more time to file a document*” in the General Filing and Service section above, and “*What if we are settling but we need more time to*

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<sup>66</sup> See Memorandum Re: Amendment of Hearing Clerk Pilot Program as to CAFOs, Mar. 14, 2014 (available on the OALJ website at <https://www.epa.gov/alj>).



*file the CAFO before a deadline” in this section above.*

## VIII. CONSOLIDATION AND SEVERANCE

***What does the OALJ advise in regard to consolidation or severance in cases involving the same or related respondent, facility, or event?***<sup>67</sup>

- Consolidation is encouraged where there are common parties and/or violations arising from the same event, same facility, or related facilities, and consolidation would expedite and simplify consideration of the issues.
- Consolidation allows cases to retain separate identities and does not affect any party’s substantive rights.<sup>68</sup>
- A party wishing to consolidate certain cases should file and serve a motion for consolidation in each of the cases; do not file one motion with both docket numbers. A party should never file single documents applicable to separate cases, listing the different docket numbers serially in the caption and expecting the Headquarters Hearing Clerk and ALJ to make copies and file them in each of the various case files. Always file and serve separate motions, status reports, and other documents for each case, unless and until a motion for consolidation is granted by the ALJ.
- A party may file and serve a motion requesting severance of claims if the party believes that they are misjoined or that severance is necessary in order to prevent delay or prejudice.
- Motions to consolidate or sever cases should be filed as early in the proceedings as possible.

## IX. MOTIONS

***How do I file a motion?***<sup>69</sup>

- To make a request of the ALJ, you must create a separate written document titled as a motion for the requested action (i.e., “Motion for . . .”). The motion must be formatted, filed, and served as stated above.<sup>70</sup> For more information, see “*How should I format a*

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<sup>67</sup> See 40 C.F.R. § 22.12 (discussing consolidation and severance).

<sup>68</sup> 40 C.F.R. § 22.12; *see also Alyeska Pipeline Serv. Co.*, No. CAA-1091-10-15-113 *et al.* (EPA ALJ Oct. 16, 1992) (Order Granting Motion to Consolidate), [https://yosemite.epa.gov/oarm/alj/alj\\_web\\_docket.nsf/All%20Content%20-%20Web/2331367876BC231D85257FBC007022C8/\\$File/CAA-1091-10-15-113\\_AlyeskaPipelineService\\_16-10-1992\\_OrderGrantMTConsolidate\\_Nissen.pdf](https://yosemite.epa.gov/oarm/alj/alj_web_docket.nsf/All%20Content%20-%20Web/2331367876BC231D85257FBC007022C8/$File/CAA-1091-10-15-113_AlyeskaPipelineService_16-10-1992_OrderGrantMTConsolidate_Nissen.pdf) (discussing the effect of consolidation on party’s substantive rights).

<sup>69</sup> See 40 C.F.R. § 22.16 (discussing the procedure and required content of motions).

<sup>70</sup> 40 C.F.R. § 22.16(a).

*document to be filed in an administrative proceeding?” and “How do I file and serve a document?” in the General Filing and Service section above.*

- The motion should state specifically what you are requesting and specific reasons for your request.<sup>71</sup>
- Before filing the motion, you should contact the opposing party and ask whether the party agrees with your request. You should then include in the motion whether the parties agree. Such contact need not be confrontational, only informative. The consent of the opposing party does not assure that the motion will be granted by the ALJ.
- If you rely upon any documents not already filed to support your motion, these documents should be attached to your motion and labeled numerically or alphabetically (i.e., “Attachment 1,” “Attachment A”).<sup>72</sup> If you rely upon a document that has already been filed in the case (e.g., the answer or an exhibit in the prehearing exchange), you may simply refer to the document rather than attaching another copy to your motion.
- Your motion and any memorandum of law in support of your motion should be merged into one document with one set of page numbers. This simplifies citations to the motion and/or memorandum.
- Do not submit proposed orders.
- If the opposing party responds to your motion, you must file any reply within ten days of service of the response. The reply to a response is limited to the issues raised in the response.<sup>73</sup> If the response was served by U.S. mail or commercial delivery service, including overnight or same-day delivery, the time to reply is expanded by three days, such that your reply is due 13 calendar days after the response was served.<sup>74</sup> The time to reply is not expanded by three days when the response was served by personal delivery, facsimile, or email.

#### ***How do I respond to a motion with which I disagree?***<sup>75</sup>

- You must file and serve a written response to that motion (see “*How should I format a document to be filed in an administrative proceeding?*” and “*How do I file and serve a document?*” in the General Filing and Service section above).<sup>76</sup>
- Your response to the motion must be filed within 15 days after the motion was served, as

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<sup>71</sup> 40 C.F.R. § 22.16(b).

<sup>72</sup> 40 C.F.R. § 22.16(a)(4).

<sup>73</sup> 40 C.F.R. § 22.16(b).

<sup>74</sup> 40 C.F.R. § 22.16(b).

<sup>75</sup> See 40 C.F.R. § 22.16(b) (setting forth the procedure for responses to motions).

<sup>76</sup> 40 C.F.R. §§ 22.5(a)–(b), 22.16(b).

shown in the certificate of service.<sup>77</sup> If the motion was served by U.S. mail or commercial delivery service, including overnight or same-day delivery, the time to respond is expanded by three days, such that your response is due 18 calendar days after the motion was served. The time to respond is not expanded by three days when the motion was served by personal delivery, facsimile, or email.<sup>78</sup>

- The ALJ may set a shorter or longer time for a response to a motion. If the ALJ sets a date for the response to a motion, the response is due on that date, regardless of the method by which the motion was served.<sup>79</sup>
- You should file a response even if the opposing party wrote in the motion that you disagree with it. Failure to timely respond to a motion waives any objection to granting of the motion.<sup>80</sup>
- If you rely upon any documents not already filed to support your response, these documents should be attached to your motion and labeled numerically or alphabetically (i.e., “Attachment 1,” “Attachment A”).<sup>81</sup> If you rely upon a document that has already been filed in the case (e.g., the answer or an exhibit in the prehearing exchange), you may simply refer to the document rather than attaching another copy to your response.

***What can I do if I disagree with the ALJ’s order ruling on a motion?***<sup>82</sup>

- You may file a motion requesting that the ALJ certify the order for interlocutory appeal to the Environmental Appeals Board (“EAB”). Such motions must be filed within ten days of service of the ALJ’s order and must indicate:
  - (1) why there are substantial grounds for difference of opinion as to an important question of law or policy arising from the order; and
  - (2) why an immediate appeal will materially advance the ultimate disposition of the case or the EAB’s review after the initial decision is issued would be inadequate or ineffective.<sup>83</sup>
- The Rules of Practice specifically address motions to reconsider a final order of the EAB.<sup>84</sup> However, there is no provision in the Rules of Practice for reconsideration of an ALJ’s order or initial decision. You may file a motion for reconsideration if you think the order or initial decision relies on a material mistake of fact or law. Such a motion

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<sup>77</sup> 40 C.F.R. § 22.16(b).

<sup>78</sup> 40 C.F.R. § 22.7(c).

<sup>79</sup> 40 C.F.R. § 22.16(b).

<sup>80</sup> 40 C.F.R. § 22.16(b).

<sup>81</sup> 40 C.F.R. § 22.16(b).

<sup>82</sup> See 40 C.F.R. § 22.29 (addressing interlocutory appeals).

<sup>83</sup> 40 C.F.R. § 22.29.

<sup>84</sup> 40 C.F.R. § 22.32.

will be denied if you merely attempt to reargue your position.

## X. PREHEARING EXCHANGE

### *What procedures apply to the prehearing exchange?*<sup>85</sup>

- After an ALJ is assigned to adjudicate a case, the ALJ typically issues a prehearing order setting various deadlines, including deadlines for the parties to engage in a prehearing exchange of information. The prehearing exchange of information consists of the complainant first filing an initial prehearing exchange, followed by the respondent filing a prehearing exchange and the complainant then filing a rebuttal prehearing exchange.
- Prehearing exchanges must be filed and served on or before the date stated in the Prehearing Order, unless:
  - (1) a CAFO has been fully executed and filed with the appropriate Regional Hearing Clerk (if the case was initiated in a regional office of EPA) or the Clerk of the Environmental Appeals Board (if the case was initiated by a Headquarters office of EPA) on or before that due date, or
  - (2) a motion for an extension of time to file the prehearing exchange has been granted by the presiding ALJ (see “*What if I need more time to file a document?*” in the General Filing and Service section above).
- The mere fact that parties have agreed to a settlement or have drafted a CAFO does not cancel prehearing exchange requirements (see “*Must I file a prehearing exchange if we are settling the case?*” and “*What if we are settling but need more time to file the CAFO before a deadline?*” in the Settlement section above, for more information).
- Prehearing exchanges not only must be served on all parties, but also must be filed with the Headquarters Hearing Clerk and served on the presiding ALJ.<sup>86</sup>
- If, as part of its prehearing exchange, a party fails to provide any document, exhibit, witness name, or summary of expected testimony to all parties at least 15 days before the hearing date, such proposed evidence will not be admitted as evidence by the ALJ, unless the party proposing such evidence had good cause for failing to exchange the proposed evidence and either provided it as soon as it had control of the information or had good cause for not doing so.<sup>87</sup>
- If you fail to exchange information as required, the ALJ may:

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<sup>85</sup> See 40 C.F.R. §§ 22.19, 22.22 (detailing the rules relating to the prehearing exchange).

<sup>86</sup> See 40 C.F.R. §§ 22.5(a)–(b), 22.19(a) (addressing filing and service required for the prehearing exchange).

<sup>87</sup> 40 C.F.R. § 22.22(a).

- infer that the information would be averse to you;
  - exclude the information from evidence; or
  - issue a default order.<sup>88</sup>
- A decision on default, assessing the complainant’s proposed penalty, may be issued even where there is a single failure to submit prehearing exchange information on time.<sup>89</sup>

***What am I required to provide in the prehearing exchange?<sup>90</sup>***

- In the prehearing order, the ALJ identifies the respective documents that the complainant and respondent are required to provide. Generally, you will be directed to provide:
  - (1) a prehearing exchange statement, containing:
    - (a) a list of names of all witnesses whose testimony you wish to present at the hearing,<sup>91</sup> identifying whether each witness is a “fact witness” or an “expert witness”;
    - (b) a brief narrative summary of the testimony that each witness is expected to provide;<sup>92</sup>
    - (c) a list of all documents, numbered in sequential order, that you wish to offer into evidence as exhibits at the hearing;
    - (d) a statement identifying the amount of time needed to present your direct case and whether the services of an interpreter are necessary with regard to the testimony of any witness, and if so, the language to be translated; and
    - (e) a response to any specific items addressed to you in the prehearing order.
  - (2) a copy of each document identified in the list of proposed exhibits provided in your prehearing exchange statement,<sup>93</sup> and
  - (3) a copy of a resume or curriculum vitae for each expert witness.
- If the case involves any state, county, or local government laws, codes, or rules, the

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<sup>88</sup> 40 C.F.R. § 22.19(g).

<sup>89</sup> See *JHNY, Inc.*, 12 E.A.D. 372, 389–90 (EAB 2005) (stating that the Agency has upheld a default order upon a party’s single failure to file a timely prehearing exchange).

<sup>90</sup> See 40 C.F.R. § 22.19 (discussing the requirements of the prehearing exchange).

<sup>91</sup> 40 C.F.R. § 22.19(a)(2)(i).

<sup>92</sup> 40 C.F.R. § 22.19(a)(2)(i).

<sup>93</sup> 40 C.F.R. § 22.19(a)(2)(ii).

complainant should include in its prehearing exchange copies of such laws because it may be difficult for the staff of the OALJ to access those authorities.

- To defend against the charges in the complaint, the respondent may present only witness testimony, or only documents, or both. The respondent may also choose only to cross-examine the complainant. If you wish only to conduct cross-examination, you should state that intention in your prehearing exchange statement in lieu of providing a list of names of witnesses.

***What information is expected in the narrative summary of expected testimony in the prehearing exchange?<sup>94</sup>***

- The narrative summary of expected testimony should include the following with respect to each witness: (1) job title and occupation; (2) relationship to the case; (3) issues to be addressed; and (4) all of the subject matter that the witness will testify about (i.e., which facts the witness will testify to, and with respect to each expert witness, which subject(s) of expertise and what opinion(s) the testimony will provide.).
- The Rules of Practice do not set a standard for the degree of specificity of the summary of testimony, so there is no authority for precluding testimony at the hearing on the basis of failure to provide a sufficiently specific summary of testimony.<sup>95</sup> The remedy for a deficient summary is a motion to compel discovery.<sup>96</sup> However, a witness may not be allowed to testify beyond the reasonable scope of the summary of testimony provided for the witness in the prehearing exchange.

***How do I distinguish between expert and fact witnesses?<sup>97</sup>***

- A fact witness may testify on matters of personal knowledge (e.g., what the witness has personally observed).<sup>98</sup>
- An expert witness may give opinions regarding specialized knowledge that is based on education, training, or experience.<sup>99</sup>

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<sup>94</sup> See 40 C.F.R. § 22.19(a)(2)(i) (requiring a brief narrative summary of expected witness testimony).

<sup>95</sup> See *Strong Steel Prod., LLC*, 2003 WL 22534560, at \*15 (ALJ, Oct. 27, 2003) (Order on Motion for Leave to File Amended Complaint and Strike Defenses and Motion in Limine) (finding “[t]here is no standard for the degree of specificity required for a summary of testimony,” and, therefore, no authority for precluding testimony for lack of specificity in the summary of testimony provided in the prehearing exchange).

<sup>96</sup> See 40 C.F.R. § 22.19(e) (addressing motions for additional discovery).

<sup>97</sup> See generally Fed. R. Evid. 602, 702, 703 (discussing witness testimony). Although not controlling on administrative hearings before OALJ, these rules provide a foundation for fact and expert witness testimony.

<sup>98</sup> See Fed. R. Evid. 602 (describing the need for personal knowledge on testimony).

<sup>99</sup> See Fed. R. Evid. 702-703 (discussing expert testimony).

- A witness may testify as both a fact and expert witness.

***What documents are required for expert witnesses in the prehearing exchange?***

- You must submit a copy of a resume or curriculum vitae for each expert witness.
- Witnesses who testify as to the calculation of the penalty are akin to expert witnesses, and the prehearing exchange should include a resume or curriculum vitae for such witnesses.<sup>100</sup>
- The Rules of Practice do not require the submission of expert reports for expert witnesses. However, submitting an expert report for each proposed expert witness as part of the prehearing exchange is strongly encouraged.
- Documents that an expert witness relied on for testimony or a report may be submitted in the prehearing exchange or may be used merely to refresh the expert's memory at the hearing.

***What format should documents be presented in for the prehearing exchange?***

- Documents submitted with the prehearing exchange as proposed exhibits should be marked for identification as follows:
  - The complainant's exhibits should be identified as "CX."
  - The respondent's exhibits should be identified as "RX."
  - Each exhibit should be labeled numerically with the corresponding exhibit number on each page of the exhibit. For example, the first exhibit provided by the complainant should be labeled on each page of the exhibit as "CX 1." The label for each exhibit should be located at the bottom (footer) of the document and aligned to the right margin.
  - Any exhibit consisting of more than one page should include page numbers at the bottom (footer) of each page, aligned to the right margin. The pages should be numbered consecutively as follows: "Page X of [total of] Y," with "Page X" representing the page number in sequence beginning from the number 1 and "[total of] Y" representing the total number of pages in the exhibit. For example, to identify the third page of complainant's first exhibit, which has five pages total, the bottom of the page should read "CX 1 Page 3 of 5."

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<sup>100</sup> See *Strong Steel Prod., LLC*, 2003 WL 22534560, at \*19–20 (ALJ, Oct. 27, 2003) (finding penalty witnesses akin to expert witnesses); see also *Rhee Bros., Inc.*, 2006 WL 2847398, at \*24 (ALJ, Sept. 19, 2006) (identifying respondent's penalty witness as an expert witness).

- When you file proposed exhibits in paper format, double-sided printing is acceptable. You should organize the paper copies in three-ring binders and separate the proposed exhibits by tabbed dividers numbered sequentially, with the number on each tab corresponding with the numbers of the exhibit immediately following the tab.
- When you file proposed exhibits electronically, any textual documents must be in PDF. Multiple proposed exhibits filed together in a single electronic file should be organized using bookmarks corresponding to the exhibit numbers.

***What can I do if, after I have filed my prehearing exchange, I find an additional document or witness that I want the ALJ to consider?*<sup>101</sup>**

- If, after you file your prehearing exchange, you find additional documents and/or witnesses you wish to have the ALJ consider, then you should promptly file and serve a supplement to your prehearing exchange with copies of the document(s) and/or names of the witness(es) and a summary of the anticipated testimony.
- The Rules of Practice do not require you to file and serve a motion together with the supplement to your prehearing exchange if the supplement is provided 15 or more days prior to the scheduled hearing.<sup>102</sup> However, the ALJs typically require that such a motion be filed if supplementation is sought within 60 days of the scheduled hearing. A motion to supplement the prehearing exchange should describe the additional information and explain why it was not provided earlier. If the motion to supplement the prehearing exchange is submitted less than 15 days before the hearing date, you must not only explain why it was not submitted earlier, but also state either (1) that you provided the additional information to the opposing party as soon as you knew about it, or (2) why you did not do so.<sup>103</sup> As with any motion, you should ask the opposing party whether it agrees with the motion and state in the motion the opposing party's position.

***What should I do if I find that something in my prehearing exchange, or in my response to an order for discovery, is outdated, inaccurate, or incomplete?*<sup>104</sup>**

- If, after you file your prehearing exchange or a response to an order for discovery, you find that the information you provided is outdated, inaccurate, and/or incomplete, then you should promptly file and serve a supplement to your prehearing exchange or response providing the updated, corrected, and/or complete information.<sup>105</sup>

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<sup>101</sup> See 40 C.F.R. § 22.22(a)(1) (discussing supplementing a prior prehearing exchange).

<sup>102</sup> See 40 C.F.R. § 22.22(a)(1) (setting forth the rule for amending the prehearing exchange less than 15 days prior to the hearing).

<sup>103</sup> See 40 C.F.R. § 22.22(a)(1) (setting forth the standard for such submissions).

<sup>104</sup> See 40 C.F.R. §§ 22.19(f), 22.22(a)(1) (addressing supplementing a prior prehearing exchange).

<sup>105</sup> 40 C.F.R. § 22.19(f).



- The Rules of Practice do not require you to file and serve a motion together with the supplement to your prehearing exchange or response to an order for discovery. However, the ALJs typically require that motions to supplement a party’s prehearing exchange be filed if supplementation is sought within 60 days of the scheduled hearing. A motion to supplement the prehearing exchange on the basis that it is outdated, inaccurate, and/or incomplete should state when you discovered the deficiency and that you provided the supplemental information immediately after such discovery, or why you did not.

## **XI. OBTAINING EVIDENCE AND DISCOVERY**

*How can I get information from the opposing party or its witnesses that may help my case?*<sup>106</sup>

- First, try courteously asking the opposing party to provide it to you.
- If the opposing party refuses to voluntarily provide the requested information, you may file and serve a motion to compel discovery after the prehearing exchange is complete, but before any deadline for such motions set by the ALJ.
- A motion to compel discovery requests the ALJ to order a party to provide certain documents to the requesting party (called a “request for production of documents”), to answer a list of questions (called “interrogatories”), to admit facts (called “requests for admission”), or to allow the requesting party to have an opposing party’s witness answer questions under oath, recorded by a court reporter, either in person or by telephone (called “deposition of a witness”).
- Your motion to compel discovery must include a statement of what type of discovery you seek (e.g., request for production of documents, interrogatories, requests for admission, deposition of a witness) and, depending on that type: (1) a detailed description of the documents you are requesting; (2) a list of interrogatories; (3) a list of facts you want the opposing party to admit; and/or (4) the date, time, and place that you wish to take a deposition in person or the date and time you wish to take a deposition by telephone.<sup>107</sup>
- You should state in your motion: (1) why your requested discovery will not unreasonably delay the proceeding nor unreasonably burden the opposing party; (2) that the opposing party has refused to provide you the information voluntarily, and why the information is most reasonably obtained from the opposing party; and (3) which disputed fact(s) the information is intended to help you prove.<sup>108</sup>
- If you wish to take a deposition, you must also explain: (1) why interrogatories, requests for admission, and/or a request for production of documents would not be a satisfactory alternative; or (2) why you believe the witness you wish to depose would provide

<sup>106</sup> See 40 C.F.R. § 22.19(e) (discussing motions for additional discovery).

<sup>107</sup> See 40 C.F.R. § 22.19(e)(1) (stating requirements of a motion for additional discovery).

<sup>108</sup> See 40 C.F.R. § 22.19(e)(1) (setting forth the standard for granting a motion for additional discovery).

relevant and probative evidence that may otherwise not be preserved for the hearing.<sup>109</sup>

- The Rules of Practice are not hospitable to discovery by deposition, but depositions may be needed to probe issues of veracity and credibility.<sup>110</sup>
- Motions to take depositions are more likely to be granted where the opposing party is not forthcoming with information by other discovery methods such as interrogatories.<sup>111</sup>
- Subpoenas for discovery purposes are rarely requested.
- The standard for discovery under the Rules of Practice is more restrictive than that under the Federal Rules of Civil Procedure.<sup>112</sup>
- You may also request information from EPA by submitting a written request under the Freedom of Information Act (“FOIA”) to the EPA FOIA office or by filing online.<sup>113</sup>

***If I receive a request for discovery (including requests for admission, production of documents, answers to interrogatories, etc.), what are my obligations and options?<sup>114</sup>***

- If you receive a discovery request prior to any due date for your prehearing exchange, you may file a response opposing it on the basis that it is premature.<sup>115</sup>
- If you receive a discovery request after you have submitted your prehearing exchange, you should fully and fairly respond to each particular request (i.e., each admission, each document request (“request for production”), and each interrogatory).
- If you have no knowledge about a particular admission or an interrogatory, or a document requested does not exist, you should state that in your response.
- If there is any request for documents or interrogatories seeking information that you

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<sup>109</sup> See 40 C.F.R. § 22.19(e)(3) (discussing the necessary findings for ordering depositions).

<sup>110</sup> See *Acierno*, 2008 WL 483488, at \*32–33 (ALJ, Feb. 15, 2008) (Order on Motions) (acknowledging that “the Consolidated Rules of Practice are not hospitable to discovery by deposition,” but ordering the deposition of a witness due to the ineffectiveness of interrogatories for dealing with matters of veracity and credibility).

<sup>111</sup> See *Isochem N. Am., LLC*, 2008 WL 713742, at \*6 (ALJ, Mar. 6, 2008) (Order on Complainant’s Motion to Compel Discovery) (ordering deposition of a witness where the opposing party demonstrated a tendency to be non-responsive and sparse in responding).

<sup>112</sup> *Motiva Enter., LLC*, 2001 WL 1557780, at \*3 (ALJ, Aug. 17, 2001) (Order on Motion for Limited Additional Discovery) (citing *Tenn. Valley Auth.*, CAA Docket No. 00-6, 2000 EPA App. LEXIS 22, at \*5 (EAB, June 29, 2000)).

<sup>113</sup> <https://www.epa.gov/foia>.

<sup>114</sup> See 40 C.F.R. § 22.19(e) (discussing discovery requests).

<sup>115</sup> See 40 C.F.R. § 22.19(e)(1) (setting forth the procedure for a request for additional discovery).

believe is entitled to confidential treatment, you should state that in your response and submit any responses or documents under seal (see “*What if some of my evidence is confidential and I don’t want the public to access it?*” in the General Filing and Service section above).

- If you object to a particular admission, interrogatory, or document request on the basis that it is irrelevant or immaterial to the case, you should state that in your response.
  - Note that information regarding the credibility of a party or key witness may be relevant and subject to discovery.<sup>116</sup>
- If you object to a particular document request on the basis that it is overly burdensome to obtain or submit the documents (e.g., if the request is overly broad, seeking box-loads of documents), you should state that in your response along with an explanation of why it is overly burdensome.
- If you cannot submit the response within the time requested by the opposing party, you should send the opposing party a written request for additional time to respond, explaining the need for additional time and setting a date on which you will submit the response.
- If the opposing party is not satisfied with your response, or if you do not timely respond to the request, the opposing party may file a motion to compel discovery or a motion for additional discovery.
  - If you receive such a motion, you should file and serve a response to the motion within 15 days from the date of service on the certificate of service if it was served by personal delivery, facsimile, or email, or within 18 days from the date of service on the certificate of service if it was served by U.S. mail or commercial delivery service, including overnight or same-day delivery.<sup>117</sup> It should include an explanation of your objection to each discovery request, or an explanation as to why you did not respond to any request for which you did not provide a response.
  - Once the ALJ grants a motion to compel discovery (or motion for additional discovery), you are obligated to provide all information requested that the ALJ approves.<sup>118</sup>

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<sup>116</sup> See *Isochem N. Am., LLC*, 2008 WL 1744633, at \*6 (ALJ, Apr. 10, 2008) (Order on Complainant’s Third Motion for Discovery) (finding that evidence relevant to the credibility of a party or a key witness is discoverable information).

<sup>117</sup> See 40 C.F.R. §§ 22.6(c), 22.16(b) (discussing timing and response to motions).

<sup>118</sup> See *Isochem N. Am., LLC*, 2008 WL 1744633, at \*3 (ALJ, Apr. 10, 2008) (Order on Complainant’s Third Motion for Discovery) (finding that under the Rules of Practice, “the opportunity to object to discovery requests occurs in response to the *motion* for discovery under 40 C.F.R. § 22.19(e)(1), unlike voluntary discovery in Federal court proceedings under Federal Rule of Civil Procedure 33”).

- If you fail to exchange information ordered by the ALJ (including incomplete and/or untimely submission), the ALJ may:
  - infer that the information would be averse to you;
  - exclude the information from evidence; or
  - issue a default order.<sup>119</sup>

## XII. DEFAULT

### *What can I do if I receive an order to show cause or a motion for default?*<sup>120</sup>

- An order to show cause may be issued by the ALJ when a party fails to file its prehearing exchange or another document by its due date, or otherwise fails to comply with an order of the ALJ.<sup>121</sup>
- Similarly, a motion for default may be filed by a party when the opposing party does not file an answer to the complaint, a prehearing exchange, or other required document by its due date, or otherwise fails to comply with an order of the ALJ.<sup>122</sup>
- If you receive an order to show cause or motion for default, you should file and serve a written response, explaining why the document in question was not timely filed or why you otherwise failed to comply with order in question. You should include with your response the answer, prehearing exchange, or other required document(s).
  - For an order to show cause, the response must be received by the Headquarters Hearing Clerk, opposing party, and the ALJ on or before the date set by the order to show cause.
  - For a motion for default, the response must be received by the Headquarters Hearing Clerk, opposing party, and the ALJ within 15 days from the date on the certificate of service of the motion if it was served by personal delivery, facsimile, or email, or within 18 days from the date on the certificate of service of the motion if it was served by U.S. mail or commercial delivery service, including overnight or same-day

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<sup>119</sup> 40 C.F.R. § 22.19(g); *see also Ag-Air Flying Serv., Inc.*, 2006 WL 3406322 (ALJ, Jan. 27, 2006) (Order Granting Complainant's Motion for Default for Failure to Submit Additional Discovery), *aff'd*, FIFRA App. No. 06-01, 2006 WL 3073096 (EAB, Sept. 1, 2006) (upholding a motion for default for failure to submit additional discovery); *William E. Comely, Inc.*, 11 E.A.D. 247 (EAB 2004) (upholding the determination of an ALJ applying an adverse inference based upon respondents' failure to comply with a discovery order).

<sup>120</sup> *See* 40 C.F.R. § 22.17 (addressing the procedure applicable to default).

<sup>121</sup> 40 C.F.R. § 22.19(g)(3).

<sup>122</sup> 40 C.F.R. § 22.17(a).

delivery.<sup>123</sup>

- Failure to respond by the due date for a response likely will result in the ALJ issuing a default order that, if entered against a respondent, requires the respondent to pay the full amount of the penalty proposed by EPA within 30 days.<sup>124</sup>
- A lack of willful intent is not, by itself, a sufficient excuse for failure to timely file a required document.<sup>125</sup>
- The ALJ is not bound by the standard for default under the Federal Rules of Civil Procedure in EPA administrative proceedings.<sup>126</sup>

***What can I do if I receive a default order?***<sup>127</sup>

- You may file and serve a motion to set aside the default order. In order to prevail, you must explain “good cause” for why you did not submit an answer, the prehearing exchange, or other required document in a timely manner, or why you otherwise failed to comply with an order of the ALJ.<sup>128</sup> You should also: include in such motion the reasons why you believe you may win the case or why the penalty should be significantly reduced.
- The motion to set aside the default order must be filed within 45 calendar days after the default order was served (as shown on the certificate of service). After 45 days, it becomes a final order of the EPA.<sup>129</sup>

### **XIII. ACCELERATED DECISION AND DISMISSAL**

***As the respondent, how do I respond if the complainant files a motion for accelerated decision?***<sup>130</sup>

- The complainant may file a motion for accelerated decision as to liability, penalty, or both. Such motions are analogous to motions for summary judgment under Federal Rule of Civil Procedure 56.<sup>131</sup>
- A motion for accelerated decision on liability requests that the ALJ find that the

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<sup>123</sup> See 40 C.F.R. §§ 22.7(c), 22.16(b) (discussing timing and response to motions).

<sup>124</sup> 40 C.F.R. § 22.17(c), (d).

<sup>125</sup> *Jiffy Builders, Inc.*, 8 E.A.D. 315, 319 (EAB 1999).

<sup>126</sup> *Pyramid Chem. Co.*, 11 E.A.D. 657, 661 n.9 (EAB 2004).

<sup>127</sup> See 40 C.F.R. § 22.17(c) (discussing default orders and setting aside such orders).

<sup>128</sup> See 40 C.F.R. § 22.17(c) (addressing setting aside default orders).

<sup>129</sup> 40 C.F.R. § 22.27(c).

<sup>130</sup> See 40 C.F.R. § 22.20 (discussing the motion for accelerated decision and standard for granting this motion).

<sup>131</sup> See 40 C.F.R. § 22.20(a) (articulating the standard for accelerated decision).

respondent committed the violation(s) charged in the complaint on the basis that the respondent has not shown that any of the facts upon which the violation is based are genuinely in dispute, and did not show any adequate legal reason why it should not be held responsible (i.e., “liable”) for the violation.

- If you admit that the violation occurred and that you are responsible for it, but you dispute whether a penalty should be assessed or the amount of the proposed penalty, then simply state that in your response to the motion, and file and serve the response within the required time frame (see “*How do I respond to a motion with which I disagree?*” in the Motions section above).
- If you oppose the motion for accelerated decision on liability, you must file and serve a response within the required time period (see “*How do I respond to a motion with which I disagree?*” in the Motions section above).
- Your response must specifically state any facts in the complaint that you believe are not accurate. It must also explain in detail why you believe there was no violation, or why you believe you are not responsible for the violation(s).
- If the complainant also requests accelerated decision as to the penalty, then your response should state in detail all of the facts that you believe should reduce or eliminate the penalty.
- Mere assertions, conclusory allegations, or suspicions are not sufficient to defeat a motion for accelerated decision.<sup>132</sup> Therefore, you must support your objections to accelerated decision by referring to any documents in the prehearing exchange and/or attaching to your response any other documents that you believe support your reasoning.

***As the respondent, how do I request that the proceeding be dismissed?***<sup>133</sup>

- There are two available motions for a respondent to request the ALJ to dismiss a proceeding brought by the complainant:
  - (1) a motion to dismiss, seeking judgment on the pleadings, in which no documents other than the complaint and answer are relied upon to decide whether dismissal is warranted based upon failure to state a case, like a motion under Federal Rule of Civil Procedure 12(b) or 12(c); or

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<sup>132</sup> See *Martex Farms, Inc.*, No. FIFRA-02-2005-5301 (EPA ALJ Oct. 4, 2005) (Order on Complainant’s Motion for Findings of Fact and Conclusions of Law and for Partial Accelerated Decision as to Liability), [https://yosemite.epa.gov/oarm/alj/alj\\_web\\_docket.nsf/All%20Content%20-%20Web/9F347B1466F6C3F285257FBC007023EC/\\$File/martex-ord-acc-dec-100405.pdf](https://yosemite.epa.gov/oarm/alj/alj_web_docket.nsf/All%20Content%20-%20Web/9F347B1466F6C3F285257FBC007023EC/$File/martex-ord-acc-dec-100405.pdf) (“Bare assertions, conclusory allegations or suspicions’ are insufficient to raise a genuine issue of material fact.”) (quoting *Jones v. Chieffo*, 833 F. Supp. 498, 503 (E.D. Pa. 1993)).

<sup>133</sup> See 40 C.F.R. §§ 22.20, 22.24(a) (discussing dismissal and the standard for such action).

- (2) a motion for accelerated decision under 40 C.F.R. § 22.20, which is analogous to a motion for summary judgment under Federal Rule of Civil Procedure 56, and essentially asks for a favorable ruling based upon uncontested facts.<sup>134</sup>
- See “*How do I request that the complaint be dismissed?*” in the Complaint and Answer section above for more information on filing a motion to dismiss. Also, see “*How should I format a document to be filed in an administrative proceeding?*” and “*How do I file and serve a document?*” in the General Filing and Service section above for more information on formatting, filing, and serving the applicable motion.
- Note that bankruptcy, insolvency, lack of knowledge of the legal requirement, or lack of intent to violate a statute or rule are not adequate reasons to dismiss a complaint.

#### XIV. STIPULATIONS

##### *What does the ALJ expect regarding stipulations?*

- ALJs encourage parties to stipulate to as much as possible in order to make the hearing more efficient and focused on those matters that are actually in dispute.
- Typically, the ALJ adjudicating your case will order the parties to file by a certain date prior to the hearing any stipulations reached by the parties. The stipulations should be presented in a writing signed by both parties as a joint set of stipulated facts, exhibits, and/or testimony.
  - Stipulations as to exhibits may be:
    - (1) only as to the authenticity of an exhibit (an agreement that the exhibit is a genuine copy, and there are no questions as to what it is, who wrote it, when or where it was written, and whether it has been altered); and/or
    - (2) as to admissibility (an agreement that the exhibit is relevant to an issue in the case and may be admitted into evidence).
  - Stipulated testimony is direct testimony or part of direct testimony, in written form, of a witness who will appear at the hearing and be available for cross-examination, which the parties agree is admissible in evidence.<sup>135</sup> This is especially useful for expert testimony.
- If the parties are unable to reach any stipulations by the deadline set by the ALJ, they should file and serve a statement to that effect.

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<sup>134</sup> See 40 C.F.R. § 22.20(a) (describing both dismissal of the complaint and accelerated decision).

<sup>135</sup> 40 C.F.R. § 22.22(c).

- If the parties agree to more stipulations after the due date set by the ALJ, they may be filed and served on the ALJ at any time before the hearing or offered at the hearing.

## **XV. HEARING**

### ***Where and when will a hearing be held?***<sup>136</sup>

- Each party is asked to state in its Preliminary Statement the county or city where it prefers to have the hearing held (see “*What am I required to provide in the preliminary statement?*” in the Preliminary Statements section above). Failure to state a preference will be taken as an indication that you have no preference.
- Generally, the ALJ decides to hold the hearing in a federal, state, or local courthouse located in the county where the respondent resides or conducts the business that is the subject of the complaint, or in another county requested by the respondent, considering the location of both parties’ witnesses and counsel.<sup>137</sup>
- The hearing is scheduled after completion of the prehearing exchange, and the parties are given at least 30 days notice of the hearing.<sup>138</sup>

### ***What can I do if I do not want to have a hearing?***

- If you do not want to settle the case, or cannot settle the case, but also do not wish to go through a courtroom hearing, you and the opposing party can file a joint motion requesting that the ALJ conduct a “paper hearing.”
- Paper hearings can take place even if the parties dispute material issues of fact or law, as long as the parties do not want or need to present the oral testimony of witnesses at a hearing, or to orally cross-examine the opposing party’s witnesses.
- When the ALJ grants a joint motion for a paper hearing, the ALJ decides the case based solely on the documents submitted by the parties. Such documents can include the written testimony of witnesses, if the parties agree to waive oral cross-examination, if the parties agree to the written submission of what the witnesses’ testimony would be on cross-examination, or if a particular witness is unavailable.

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<sup>136</sup> See 40 C.F.R. § 22.21(b)–(d) (describing the process for setting a hearing and selecting a location for the hearing).

<sup>137</sup> See 40 C.F.R. § 22.19(d), 22.21(d) (discussing the selection of venue for prehearing conferences and hearings).

<sup>138</sup> 40 C.F.R. § 22.21(b).



***What can I do if I need a witness to testify at the hearing who does not agree to appear voluntarily or who cannot come to the hearing?***<sup>139</sup>

- You may request the ALJ to issue a subpoena to compel a witness to testify at the hearing if the case is brought under the CWA, CAA, TSCA, RCRA, EPCRA, or CERCLA, but not if it is brought under FIFRA.
  - You should submit a motion requesting issuance of the subpoena and attach to your motion a subpoena form ready for the ALJ’s signature. A template for a subpoena form is available in “The Citizen’s Guide,” which can be accessed on the OALJ website.<sup>140</sup>
  - If the ALJ grants the motion, the subpoena form will be returned to you so that you can serve it on the witness.<sup>141</sup>
  - You must pay the same fees and mileage for the witness to appear at the hearing as those paid to witnesses in federal court.<sup>142</sup>
  - The motion should be filed as soon as you have notice that the witness will not attend voluntarily, but no later than the deadline set by the ALJ in the order scheduling the hearing, so there is sufficient time for the ALJ to grant the motion and send the subpoena to you, and for you to serve it on the witness.
- You may ask the opposing party whether it would agree to submitting written interrogatories to the witness instead of cross-examining the witness at the hearing. If the opposing party agrees, then each party submits interrogatories to the witness, and you may file a motion to supplement your prehearing exchange with the answers to the interrogatories as an exhibit.
- You may ask the opposing counsel whether it would agree to participating in a deposition of the witness instead of cross-examining the witness at the hearing. If the opposing party agrees, then you may file a motion to supplement your prehearing exchange with the transcript of the deposition as an exhibit and, if you wish, a videotape of the deposition.
- If it is a key witness who cannot come to the hearing on the date scheduled, you may file a motion to reschedule the hearing.
- You may file a motion to have the witness’s testimony taken by videoconferencing, after you establish that such technology is feasible for the witness and available in the

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<sup>139</sup> See 40 C.F.R. §§ 22.19(e)(4), 22.21(b), 22.22(d) (discussing the standards and procedures for issuing subpoena and admitting affidavits).

<sup>140</sup> <https://www.epa.gov/sites/production/files/2013-09/documents/citizens-guide.pdf>.

<sup>141</sup> See 40 C.F.R. §§ 22.19(e)(4) (discussing service of subpoenas).

<sup>142</sup> 40 C.F.R. § 22.19(e)(4).

courtroom.

- You may file a motion to have the witness’s testimony taken by telephone transmission instead of the witness’s personal attendance at the hearing. This is not generally favored, as the demeanor of the witness cannot be observed and may affect the weight that can be given to the testimony.
- You may file an affidavit of the witness as evidence, along with a motion to supplement your prehearing exchange to include the affidavit, and motion requesting admission of the affidavit on the basis that the witness is unavailable. You must establish that the witness is “unavailable” within the meaning of Rule 804(a) of the Federal Rules of Evidence.<sup>143</sup> Under that Rule, a witness is considered unavailable if, for example, the witness is prevented from testifying in person at hearing by privilege, physical or mental infirmity, lack of memory, or death, or the witness persists in refusing to appear despite order of the court to do so.<sup>144</sup>

***What should I do if a witness who I wish to call at the hearing requires special accommodations in order to testify, such as wheelchair access or an interpreter?***

- If there are medical reasons why the witness is hesitant to attend the hearing, the witness may be given appropriate accommodation, such as taking testimony in brief spurts or out of turn, ensuring wheelchair access, providing a sign language interpreter, or providing testimony via videoconferencing.

***What should I do if a witness has limited time available during the hearing? May I present testimony out of order?***

- You may file a motion requesting permission from the ALJ to present a witness out of order at the hearing. (see “*How do I file a motion?*” in the General Filing and Service section above).

***What should I do if I have a motion to file just before the hearing?***

- Typically, the ALJ sets a deadline by which the parties are required to file any prehearing motions prior to the hearing. If circumstances necessitating a motion arise after that deadline, you must file a motion to file out of time explaining why you are filing after the due date, along with the motion you intend to file (see “*What if a filing deadline has already passed?*” in the General Filing and Service section above).
- You should immediately inform the opposing party of the motion and state in the motion whether the opposing party objects to or agrees with it.

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<sup>143</sup> See 40 C.F.R. § 22.22(d) (discussing the standard for admitting affidavits where the witness is unavailable).

<sup>144</sup> See Fed. R. Evid. 804(a) (setting forth the applicable standard).

- You should ensure that the ALJ and opposing party receive the motion as soon as possible before the hearing, including emailing a courtesy copy of the motion to the Headquarters Hearing Clerk and the OALJ staff attorney assigned to the case.

***What does the ALJ expect regarding exhibits at the hearing?*<sup>145</sup>**

- In addition to copies for your own use at hearing, you should bring to the hearing four more complete sets of your exhibits: one for the ALJ, one for the opposing party, one for witnesses' use during their testimony, and one for the court reporter who will transmit it to the Hearing Clerk to be retained in the official case file. You will be advised by the OALJ staff attorney assigned to the case what format these copies should be in (i.e., paper or electronic), but regardless of the format, all of the sets must be identical. Carefully review each set of the exhibits prior to hearing to confirm that each set and every document therein is complete, labeled, and legible.
- The exhibits should be marked for identification and organized as required for the parties' prehearing exchanges. Specifically:
  - The complainant's exhibits should be identified as "CX."
  - The respondent's exhibits should be identified as "RX."
  - Each exhibit should be labeled numerically with the corresponding exhibit number on each page of the exhibit. For example, the first exhibit provided by the complainant should be labeled on each page of the exhibit as "CX 1." The label for each exhibit should be located at the bottom (footer) of the document and aligned to the right margin.
  - Any exhibit consisting of more than one page should include page numbers at the bottom (footer) of each page, aligned to the right margin. The pages should be numbered consecutively as follows: "Page X of [total of] Y," with "Page X" representing the page number in sequence beginning from the number 1 and "[total of] Y" representing the total number of pages in the exhibit. For example, to identify the third page of complainant's first exhibit, which has five pages total, the bottom of the page should read "CX 1 Page 3 of 5."
  - For exhibits in paper format, double-sided printing is acceptable. You should organize the paper copies in three-ring binders and separate the exhibits by tabbed dividers numbered sequentially, with the number on each tab corresponding with the numbers of the exhibit immediately following the tab.
  - For exhibits in electronic format, any textual documents must be in PDF. Multiple exhibits compiled together in a single electronic file should be organized using bookmarks corresponding to the exhibit numbers.

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<sup>145</sup> See 40 C.F.R. § 22.22(e) (describing the requirements for exhibits).

- Exhibits that both parties intend to use as evidence may be labeled numerically as “Joint Exhibits” or “JX.” For example, a list of stipulated facts may be labeled as “JX 1.”

***If I do not intend to introduce into evidence at the hearing all of the exhibits in my prehearing exchange, should I renumber the hearing exhibits consecutively, or keep the same numbers as in the prehearing exchange?***

- Because the ALJ, witnesses, and opposing party may have become familiar with the exhibits as numbered in the prehearing exchange, you should keep the same numbers on the exhibits as the documents had in the prehearing exchange, even if it results in gaps in the exhibit numbers.

***Can I present video, slides, enlargements of exhibits (such as maps), PowerPoint presentations, or items on overhead projector at the hearing?***

- Video, slides, enlargements of exhibits, or items on overhead projector may be presented if you submit the video, un-enlarged exhibit, or items with your prehearing exchange, or as a supplement to your prehearing exchange.
- PowerPoint presentations may not be presented at the hearing unless the ALJ grants your motion either stating that the opposing party does not object or submitting paper copies of the PowerPoint frames and reasons why it should be presented.

***Can I request that the ALJ personally view the respondent’s facility or site?***

- Site visits are possible but are usually granted only when the ALJ finds that testimonial and documentary evidence, including photographs, diagrams, maps, and/or videos, are insufficient to adequately convey the pertinent visual information to the ALJ.
- If you wish to file a motion for the ALJ to take a site visit such motion must be filed in sufficient time for the ALJ to rule on it and for all logistical arrangements to be made for the site visit, including travel.
- The motion must state whether the opposing party agrees.
- The motion should state whether the purpose of the site visit is: (1) for evidence, or (2) to familiarize the ALJ with the site so the ALJ may better understand and weigh the testimony and evidence presented at the hearing.
  - If the site visit is for evidence, then you should state what issues the site visit is relevant to and why photographs or other forms of evidence are inadequate.
  - If the site visit is for familiarizing the ALJ with the site, then you should describe any complexities in the evidence or testimony and how it may be clarified, simplified, or made more efficient by a site visit.

- The motion should suggest a time for the site visit (e.g., the morning of the first day of hearing) and should state the estimated distance from the courtroom.

***What can I do if hearsay is presented at the hearing?*<sup>146</sup>**

- Hearsay is admissible at the hearing under the Rules of Practice.<sup>147</sup>

***How do I object to information presented at the hearing?*<sup>148</sup>**

- Objections can be offered at the hearing orally or in writing. In raising an objection, you must briefly state the grounds for the objection.<sup>149</sup>
- Exception to each objection overruled is automatic and is not waived by continuing to participate in the hearing.<sup>150</sup>

***What can I do if the ALJ denies my motion for admission into evidence at the hearing?*<sup>151</sup>**

- If the ALJ denies your motion for admission into evidence, you may make an offer of proof, which preserves the proposed evidence on the record for appeal to the Environmental Appeals Board (“EAB”).
  - The offer of proof for oral testimony consists of a brief statement describing the excluded testimony.
  - The offer of proof for exhibits consists of the excluded exhibits.<sup>152</sup>
  - If, upon appeal, the EAB determines that the exclusion of the proposed evidence by the ALJ was both erroneous and prejudicial, the hearing may be reopened for the admission of the evidence.<sup>153</sup>

***What are the general protocols and expectations at the hearing?***

- Hearings are generally open to the public and held in a courtroom setting in a federal, state, or local facility.

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<sup>146</sup> See 40 C.F.R. § 22.22(a) (discussing what may be admitted as evidence).

<sup>147</sup> *William E. Comely, Inc.*, 11 E.A.D. 247, 266 (EAB 2004) (“Hearsay evidence is clearly admissible under the liberal standards for admissibility of evidence in the 40 C.F.R. pt. 22 rules, which are not subject to the stricter Federal Rules of Evidence.”).

<sup>148</sup> See 40 C.F.R. § 22.23(a) (setting forth the procedure for objections).

<sup>149</sup> 40 C.F.R. § 22.23(a).

<sup>150</sup> 40 C.F.R. § 22.23(a).

<sup>151</sup> See 40 C.F.R. § 22.23(b) (detailing the procedure for making an offer of proof).

<sup>152</sup> 40 C.F.R. § 22.23(b).

<sup>153</sup> 40 C.F.R. § 22.23(b).

- You will be required to pass through a security screening prior to the hearing, and you should take that into account in determining what you bring with you to the courthouse. You may need to obtain special permission in advance from the courthouse staff to bring computers, cell phones, cameras, or other such equipment into the courthouse.
- EPA hearings are serious, formal litigation proceedings conducted in an orderly and efficient manner. You are expected to have thoroughly organized your case, witnesses, and exhibits prior to hearing.
- Appropriate civility and decorum are expected to be maintained by all hearing participants. Inappropriate language, outbursts, or threats will not be tolerated.
- Business dress attire is appropriate.
- If you wish to use any visual or audio equipment (e.g., easels, overhead projectors, videoconference equipment, video monitors) at the hearing, you are responsible for arranging for such equipment prior to the hearing and for setting it up each day before the hearing is scheduled to commence.
- Hearing hours are set by the ALJ, and the ALJ may request that the hearing continue outside of normal business hours for the convenience of the parties or witnesses or to ensure that the hearing finishes before the courtroom reservation terminates. Lunch and other breaks may be severely limited.
- You are expected to be present in the courtroom every day at least a half hour before the hearing is scheduled to begin so that any preliminary matters that arise may be dealt with expeditiously and the hearing can start on time.
- Parties may request that witnesses be sequestered, which means prevented from hearing the testimony of other witnesses prior to giving theirs. Sequestration is accomplished by physically excluding witnesses from the courtroom until called to testify. Parties' attorneys of record, designated party representatives, individual respondents, and expert witnesses are generally exempt from exclusion and allowed to remain in the courtroom, however.
- Each party may make an opening statement at the beginning of the hearing. The respondent may alternatively make an opening statement at the beginning of its direct case, instead of the beginning of the hearing.
- You should stand when questioning a witness, making objections, or otherwise addressing the ALJ.
- You should direct objections to the ALJ and not argue with your opponent. You should not overdo or offer meritless objections; such conduct may be considered prejudicial to the opposing party.

- You should advise the ALJ's staff before the hearing, such as during the prehearing conference that the OALJ staff attorney assigned to the case typically holds in the weeks preceding the hearing, of any hearing accommodations needed for hearing participants with disabilities.
- You should make the best use of time at the hearing because courtroom reservations are limited and are usually not available beyond the dates scheduled for the hearing.
- It may be simplest to present the facts of the case in chronological order, and check to make sure that you established in the testimony who, what, where, when, and how as to each event.
- Closing arguments may be made, but the ALJs provide for the filing of post-hearing briefs, which sufficiently serve the purpose of a closing argument.
- The hearing is recorded by a court reporter, and each party will be provided with an electronic copy of the transcript of testimony taken at the hearing once it is prepared by the court reporting service, unless a party requests in advance of the hearing that a paper copy of the transcript be provided.

## XVI. POST-HEARING ISSUES

### *What can I do if I find new evidence after the hearing that I want the ALJ to consider?*

- You may file a motion to reopen the hearing to take further evidence no later than 20 days after service of the ALJ's decision.<sup>154</sup>
- The motion should describe the evidence, and state the purpose of the evidence, why the evidence is not repetitive of other evidence in the record, and why the evidence was not presented at the hearing.<sup>155</sup>

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<sup>154</sup> See 40 C.F.R. § 22.28(a). Over the years, the ALJs have taken different views on whether 40 C.F.R. § 22.28(a) allows motions to reopen the hearing to be filed any time after adjournment of the hearing up until 20 days after issuance of the initial decision or if it applies only after the initial decision has been issued. *Compare, e.g., F.C. Haab Co.*, 1997 WL 821114, at \*1 n.2 (EPA ALJ Nov. 24, 1997) (Order Denying Motion to Reopen Administrative Record and Permitting Complainant to File Answer to Respondent's Reply) (holding that the language of 40 C.F.R. § 22.28 does not limit its application only to the 20-day period after the initial decision is issued), *with City of Wilkes-Barre*, No. CAA-03-2005-0053 (EPA ALJ Nov. 2, 2005) (Order Denying Complainant's Motion to Supplement Record), [https://yosemite.epa.gov/oarm/alj/alj\\_web\\_docket.nsf/All%20Content%20-%20Web/3543344BA9BB91EB85257FBC00702453/\\$File/phe-supp-deny-wilkes-b-110205.pdf](https://yosemite.epa.gov/oarm/alj/alj_web_docket.nsf/All%20Content%20-%20Web/3543344BA9BB91EB85257FBC00702453/$File/phe-supp-deny-wilkes-b-110205.pdf) (holding that motions to supplement or to reopen the record after adjournment of the hearing but prior to issuance of the initial decision are not subject to 40 C.F.R. § 22.28).

<sup>155</sup> 40 C.F.R. § 22.28(a).

***What should I do if the transcript does not reflect the actual testimony at the hearing?***<sup>156</sup>

- If, after receiving the hearing transcript following the conclusion of a hearing, you discover that the transcript contains an error, you may file a motion to conform the transcript to the actual testimony within 30 days of receipt of the transcript, or 45 days after the parties are notified of the availability of the transcript, whichever is sooner.<sup>157</sup>

***What does the ALJ expect regarding post-hearing briefs?***<sup>158</sup>

- The ALJ sets the post-hearing briefing schedule, with either the parties filing their initial briefs and reply briefs simultaneously or the parties filing their briefs on a staggered schedule, with the complainant filing its initial brief first. The briefs will not be due until at least 30 days after the parties have received the transcript.<sup>159</sup>
- Briefs should include citations to the transcript and to exhibits.<sup>160</sup>
- It is not necessary to include proposed findings of fact or conclusions of law.

## **XVII. INITIAL DECISION**

***What can I expect in the initial decision?***<sup>161</sup>

- The initial decision is the written determination of the presiding ALJ following the hearing, containing (1) findings of fact, (2) conclusions on all material issues of law with supporting reasoning, and (3) if appropriate, a recommended civil penalty assessment, compliance order, corrective action order, or Permit Action.<sup>162</sup>
- The initial decision shall become a final order within 45 days after its service upon the parties, unless a party appeals the initial decision to the Environmental Appeals Board (“EAB”) or moves to reopen the hearing, or the EAB otherwise elects to review the decision on its own initiative.<sup>163</sup>

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<sup>156</sup> See 40 C.F.R. § 22.25 (addressing motions to conform the transcript to actual testimony).

<sup>157</sup> 40 C.F.R. § 22.25.

<sup>158</sup> See 40 C.F.R. § 22.26 (discussing post-hearing briefs and proposed findings).

<sup>159</sup> 40 C.F.R. § 22.26.

<sup>160</sup> 40 C.F.R. § 22.26.

<sup>161</sup> See 40 C.F.R. § 22.27 (describing the initial decision).

<sup>162</sup> 40 C.F.R. § 22.27.

<sup>163</sup> 40 C.F.R. § 22.27(c).



### *When can I expect the initial decision?*<sup>164</sup>

- The initial decision is issued following the period for filing post-hearing briefs.<sup>165</sup>
- The process of evaluating the evidence presented at hearing and drafting the initial decision is laborious and time intensive, particularly in complex cases. As a result, the parties should not expect the ALJ to issue the initial decision until several months after the hearing.

## **XVIII. APPEALS**

### *What is the Environmental Appeals Board?*

- The Environmental Appeals Board (“EAB”) is the final Agency decision maker on administrative appeals under all major environmental statutes that the Agency administers. Thus, it functions as an administrative appeals court within EPA. It is an impartial body, independent of the EPA offices that are parties in the cases it presides over.<sup>166</sup>
- The EAB has issued “A Citizen’s Guide to EPA’s Environmental Appeals Board,” which is a plain language guide for members of the public participating in matters before the EAB.<sup>167</sup>
- Additionally, the EAB issued “The Environmental Appeals Board Practice Manual,” which explains the regulatory framework of its proceedings as well as guidance for litigants on matters related to practices before the EAB.<sup>168</sup>
- Lastly, the EAB provides a Frequently Asked Questions page on the EAB website addressing some of the most common inquiries regarding the EAB.<sup>169</sup>
- The EAB typically sits in panels of three Environmental Appeals Judges and makes decisions by majority vote.<sup>170</sup>

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<sup>164</sup> See 40 C.F.R. § 22.27(a) (discussing the issuance of an initial decision).

<sup>165</sup> 40 C.F.R. § 22.27(a).

<sup>166</sup> About the Environmental Appeals Board (EAB), <https://www.epa.gov/aboutepa/about-environmental-appeals-board-eab>.

<sup>167</sup> *A Citizen’s Guide to EPA’s Environmental Appeals Board*, [https://yosemite.epa.gov/oa/EAB\\_Web\\_Docket.nsf/8f612ee7fc725edd852570760071cb8e/381acd4d3ab4ca358525803c00499ab0/\\$FILE/Citizens%20Guide%20July%202018.pdf](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/8f612ee7fc725edd852570760071cb8e/381acd4d3ab4ca358525803c00499ab0/$FILE/Citizens%20Guide%20July%202018.pdf).

<sup>168</sup> *Environmental Appeals Board Practice Manual* (August 2013), [https://yosemite.epa.gov/oa/EAB\\_Web\\_Docket.nsf/General+Information/Practice+Manual?OpenDocument](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/General+Information/Practice+Manual?OpenDocument).

<sup>169</sup> Environmental Appeals Board, *Frequently Asked Questions*, [https://yosemite.epa.gov/oa/EAB\\_Web\\_Docket.nsf/General+Information/Frequently+Asked+Questions?OpenDocument](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/General+Information/Frequently+Asked+Questions?OpenDocument).

<sup>170</sup> *A Citizen’s Guide to EPA’s Environmental Appeals Board* at 14.

- The EAB’s review of an initial decision is “*de novo*,” meaning that the EAB is not limited by the determinations of the ALJ in the initial decision, and is able to adopt, modify, or set aside findings of fact or conclusions of law in the initial decision.<sup>171</sup>
- The EAB’s Clerk of the Board maintains EAB’s dockets and is available to answer procedural questions regarding filing documents with the EAB. The Clerk can be reached at (202) 233-0122 from 8:30 a.m. to 12 p.m., and from 1 p.m. to 4:30 p.m., Monday through Friday (excluding federal holidays).<sup>172</sup>
- The EAB’s decision is the EPA’s final decision on any dispute, and is binding on the parties, unless the respondent appeals the decision to a federal court and it is reversed.<sup>173</sup>
- The EAB maintains an online database of its own decisions, available online.<sup>174</sup>

***What is the procedure for appealing an initial decision to the EAB?***<sup>175</sup>

- If you wish to appeal an adverse initial decision, you must file an original and one copy of a notice of appeal, along with an accompanying appellate brief, with the EAB within 30 days after the initial decision is served.<sup>176</sup>
- A copy of the notice of appeal must be served upon the ALJ.<sup>177</sup>
- Copies of the notice of appeal and accompanying appellate brief must also be served on the Headquarters Hearing Clerk, the Regional Hearing Clerk, and all other parties.<sup>178</sup>
- For more information regarding procedures before the EAB, see the “The Environmental Appeals Board Practice Manual,” available online.<sup>179</sup>

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<sup>171</sup> See 40 C.F.R. § 22.30(f); *A Citizen’s Guide to EPA’s Environmental Appeals Board* at 25 (discussing the standard of review for the ALJ’s initial decision on appeal to the EAB).

<sup>172</sup> *A Citizen’s Guide to EPA’s Environmental Appeals Board* at 18.

<sup>173</sup> *A Citizen’s Guide to EPA’s Environmental Appeals Board* at 15.

<sup>174</sup> [https://yosemite.epa.gov/oa/EAB\\_Web\\_Docket.nsf/EAB+Dockets?OpenPage](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/EAB+Dockets?OpenPage).

<sup>175</sup> See 40 C.F.R. § 22.30 (discussing the procedure for appealing to the EAB).

<sup>176</sup> 40 C.F.R. § 22.30(a)(1)(i)–(ii).

<sup>177</sup> 40 C.F.R. § 22.30(a)(1)(ii).

<sup>178</sup> 40 C.F.R. § 22.30(a)(1)(ii).

<sup>179</sup> [https://yosemite.epa.gov/oa/EAB\\_Web\\_Docket.nsf/General+Information/Practice+Manual?OpenDocument](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/General+Information/Practice+Manual?OpenDocument).